ADDENDA

Being notes of Cases published up to September, 1910.

See end of the Second Volume.

THE

CODE OF CIVIL PROCEDURE

BEING

ACT NO. V OF 1908

WITH A

COMMENTARY

BY

J. O'KINEALY

LATE OF THE INDIAN CIVIL SERVICE AND JUDGE HIGH COURT, BENGAL

AND

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STATEMENT OF OBJECTS AND REASONS

Report of the Special Committee appointed to consider the amendment of the Civil Procedure Code

WE have the honour to present this report on the proposals to amend the Code of Civil Procedure which have been submitted for our consideration by the Government of India and, annexed to it a draft Bill amended by us A detailed account of the alterations *introduced in the bill will be found in the Notes on Clauses which* form the second part of this Report but we desire by way of preface to make some observations of a general character on the defects in the existing law which appear to us to call for reform and on the more important of those alterations

1 The Code of Civil Procedure of 1882 has been in force for 25 years and the experience of those years has shown that the general lines on which it proceeds are sound The matters in which it has proved defective *are for the most part matters of detail and they* arise as it seems to us mainly from the fact that it is impossible to frame a fixed and rigid Code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the Code applies In our opinion it is essential that there should be some machinery to enable variations to be introduced in procedure to meet the different requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation We propose to make provision for these purposes by a re arrangement of the Code We recommend that matters of mere machinery should be relegated to rules capable of alteration by each High Court, subject to certain checks, and that those provisions only should be retained in the body of the Code in which some degree of permanence and uniformity is desirable This re arrangement is in accordance with precedent and possesses advantages so obvious that it is needless to enlarge upon them

2 The objection—and as it appears to us the only objection of substance—that can be urged against this proposal is that until

Committee in 1903 and we desire to express our acknowledgments to that Committee for the store of information it contains and for the materials collected in their Report

Apart from the re arrangement to which reference has been made we have not introduced many changes of a radical character into the Code

4 The general nature of some of the amendments we recommend may be conveniently illustrated by a brief examination of the extent to which the various stages of a suit will be affected by them

A To begin with it is hoped that the multiplicity of suits will be further curtailed by the new provisions we have inserted to remove limitations which we regard as needless on the comprehensiveness of a suit and by the wider powers of amendment vested in the Courts under the Bill An adequate check is provided by the power of a Court to interfere where embarrassment is likely to result

B Increased facilities have been given for the service of process to which further reference is made in the Notes on Clauses It is hoped that in the gradual introduction of service by post may be found a solution of one of the principal defects in our legal system

C In our opinion it is most necessary that litigants in this country should come to trial with all issues clearly defined and that cases should not be expanded or grounds shifted without reference to the true facts For this purpose we think that the present system of pleadings in the mofussil which is notoriously lax should be improved and we have incorporated in the rules an Order on pleadings which it is hoped will lead to sounder and fairer methods of arriving at the real points in dispute The forms have been revised and we hope that they will be brought into more general use in the mofussil

We have not been able within the time at our disposal to make these forms or the other forms in the Appendix to Schedule I complete but this is a matter of detail which can be further considered before the Bill is passed into law

D It is not possible to secure expedition in the disposal of suits unless the questions of fact on which there is a real contest are narrowed down as far as possible As a step towards this, we have incorporated in the rules an Order in which provision is made for the admission not only of documents but also of facts It must be left to litigants and their advisers to make adequate use

of this order but it is hoped that the Courts will encourage the use of it, since it certainly affords a means whereby the two principal evils of litigation, delay and expense, can be materially diminished

E We attach much importance to a proper use being made by Courts in the mofussil of the procedure prescribed for the first hearing The Code as it stands makes provision for the examination of parties by the Court and we have altered the language so as to compel the production of documents at the first hearing In our opinion this will act as a substantial check on the fabrication of documentary evidence

F The provisions relating to the hearing of suits do not call for material alteration, but we have thought it well to provide expressly for the cases where a party dies between conclusion of the hearing and delivery of judgment It would obviously be wrong that such an accident should in any way interfere with the disposal of the case and we have therefore inserted a provision to enable judgment to be pronounced notwithstanding the death

G A change of importance has been made in regard to decrees In the first place we have inserted an express provision recognizing the distinction between preliminary and final decrees We hope in this way to afford facilities for checking the delay that now results from the objectionable practice of leaving for determination in execution questions which should be decided by the decree This change should ensure the more expeditious disposal of a class of suits which at present are conspicuous for the delay to which they give rise Another amendment of importance which we have introduced is in regard to mortgage suits These are very numerous and involve complicated questions of law Hitherto some confusion has been occasioned by the co existence of the provisions of the Transfer of Property Act and of the Code in regard to execution in mortgage suits We think that the provisions regulating this matter should be dealt with in their entirety in the Code and we have therefore introduced rules in Order XXXIV to give effect to our view We propose that the sections of the Transfer of Property Act affected by this change should be repealed We desire to call the attention of those Provinces to which that Act does not apply to the effect of these changes

In our opinion it is expedient to give greater assistance to the Courts in the framing of decrees The importance of this branch of procedure cannot be overrated it is surrounded by difficulties which are a fruitful source of error and consequently of litigation We have amplified the provisions of the Code to meet this defect and have introduced some forms which can be adapted to meet the requirements of individual cases We think that further forms might be added with advantage before the Bill becomes law

H Amongst other matters we have removed limitations which at present exist on the power of appointing Receivers and have conferred a power to appoint Receivers on Subordinate Courts

5 *Execution*—The subject of execution is perhaps one of the most difficult with which we have had to deal The present system in the mofussil at any rate, tends to excessive delay and affords facilities for defeating the claims of creditors At the same time the creditor often has only himself to blame owing to his own *laches* in prosecuting his rights In the Presidency Towns the same objections cannot be fairly raised the system works well whilst in the mofussil the difficulties arise not so much from the machinery itself as from the defective manner in which it is worked One of the most fruitful sources of litigation is the setting aside of execution sales on the ground of irregularity in the publication of the sale proclamation It is notorious that in many of these cases the Court's officer, either through negligence or dishonesty has not duly published the proclamation but it is impossible to deal with such cases by any provision in a Code After a most careful consideration of the subject we have not seen our way to any very drastic changes in the present system We have found ourselves unable to accept the somewhat far reaching proposal of the Committee of 1902 in relation to the execution of decrees by precept but we are so far in accord with the view expressed by that Committee as to have been able to insert in the Bill a clause which enables the Court which passed the decree to issue a precept to any other Court to attach property of the judgment debtor pending execution in the ordinary course Beyond this we have felt we could not safely go

We anticipate that there will be a substantial saving of time, and consequent expense from the provision requiring that mesne profits shall be ascertained by the Court under the decree itself and not as now in execution proceedings

Clause 53 has been introduced to settle a long mooted point upon which there is much diversity of judicial opinion as to whether or not questions as to the liability of ancestral property in the hands of a son or other descendant to whom it has come otherwise than by descent for the payment of the debt for which the decree was passed can be determined under clause 47 of the present Bill corresponding with section 244 of the existing Code We think they should be

Other amendments deserving notice relate to (1) the power to break open the outer door of the judgment debtor's dwelling house, (2) the date from which the purchaser's title accrues, (3) oral application for immediate execution (4) the discretion of the Court in the execution of decrees for the restitution of conjugal rights (5) execution against partnership property, (6) extended facilities for attaching salaries and (7) powers to decree holders to carry decrees into effect at the expense of the judgment debtor

We regard the changes made in relation to execution as calculated to materially assist the judgment creditor in recovering the fruits of his judgment

(*Arbitration*—Two questions of importance have arisen in connection with this subject (1) should any of the sections of the Arbitration Act of 1899 be incorporated into the Code (2) should the right of appeal as now existing be altered and if so in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration and insert them in a new and comprehensive Arbitration Act There are perhaps difficulties as to this at present We have determined therefore to leave the arbitration clauses much as they are in the present Code but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act

In regard to appeals some change has been made Upon this question adopting the view of the Judicial Committee as expressed in Ghulam's case (I L R 29 Cal 167) we are strongly in favour of finality in cases of arbitration If rights of appeal be given the disappointed party will take advantage of every such right To meet the difficulty expressed in the case reported in I L R 25 Cal 141 (which followed many other cases in the Calcutta High

Court\ we have inserted the words or being otherwise invalid in sub section (c) of section 521 of the present Code If therefore either party considers the award is invalid on any ground he can apply to have it set aside We have thought it right to give one appeal from the opinion exp essed by the Court on a special case under section 517 and to allow one appeal as from order under sections 521 523 and 526 And having regard to the rather wide language of the Judicial Committee in Ghulam s case we have further thought it advisable to make i clear that an order granting an application either under section 523 or 526 is not to be deemed a decree within the meaning of the Code otherwise there would be a wider right of appeal from orders under these sections than from a decree under section 522 The othe alterations deal with the text rathe than with any question of policy or principle

7 *Suits relating to public matters*—We have inserted a clause to enable actions for public nuisances to be brought with the consent of the Advocate General irrespective of special damage It has been represented to us that such a power is needed and we concur in that view

8 *Public charities*—The suggestion has been made on high authority that some express reference should be made in the Code to the power of the Court to apply the *Cy pres* doctrine in the settling of schemes But this power would appear to exist already within its proper limits (*Major of Lyons* case L R 3 I A 32) and we do not think it necessary to make express reference to it

It has been represented to us by more than one gentleman whose opinion is entitled to weight that the power to enquire into the affairs of public charities should be made more extensive The clause as it stands gives sufficient powers to the Courts to direct accounts and to frame schemes when once a suit has been instituted but it is said that members of the public interested in any public charity ought to have the means of calling for and inspecting accounts without undertaking the burden of a suit at least in the fir t instance We are told that revenues derived from charitable trusts are in some cases very large in amount that no accounts of their expenditure are ordinarily rendered and that there is good ground for believing that a considerable portion is misspent or squandered on useless objects

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leave of the Court but the most important change is that incorporated in clause 97 which renders it obligatory upon a party, who considers himself aggrieved by a preliminary decree to appeal from that decree at the risk of being precluded from disputing its correctness on an appeal from the final decree We feel strongly that this is a most useful provision as tending to that which is so desirable, *viz* finality in litigation

As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of clause 103 Experience has shown the desirability of this clause the effect of which will be to avoid remands with their consequent delay and expense

As regards appeals from orders a comparison of clause 104 of the Bill with section 588 of the existing Code would support a *prima facie* inference that the right of appeal from Orders had been materially curtailed But this inference is dispelled on looking at sub clause (*h*) of clause 104 which allows an appeal from any Order made under Rules from which an appeal is expressly allowed by Rules We have gone carefully into the question of the cases in which an appeal should be allowed from these Orders and our conclusion is expressed in the Rules themselves

12 *Rules*—The distribution of the provisions of the Code between the body of the Bill and the Rules is a matter on which opinions may well differ The general principle on which we have proceeded has been to keep in the body of the Bill those provisions which appear to us to be fundamental and those provisions which confer powers operating outside the Province in which the Court is situated In some cases we have adopted the plan of inserting leading provisions in the Bill stating in general terms the powers of the Court and of leaving the details to Rules, in matters of less importance the provisions have been relegated altogether to Rules The result of this re arrangement is to reduce the Act as distinct from Schedules to 155 clauses The existing order of sequence has speaking generally, been maintained, but the reduced bulk of the Bill has rendered it no longer necessary to reproduce the division into Chapters

It is proposed to vest the power of making Rules in High Courts subject to the control of Local Governments (or, in the case of the Calcutta High Court of the Government of India), but we

think it most desirable that in exercising this power the Courts should have the advice of representatives of the various branches of the legal profession and we have accordingly provided that, in the case of Chartered High Courts and of Chief Courts Rules shall only be made after those Courts have taken the opinion of a Rule Committee on which there will be representatives of the Bar, of Vakeels or Pleaders and in Presidency towns of Attorneys In the case of other High Courts power has been given to establish such Rule Committees as the Governor General in Council may determine It is believed that Standing Committees of this kind will be of great value We have thought it better to require the same sanction as is required by the Indian High Courts Act of 1861 in order that the rule making power should correspond with the power conferred under that Act but we are of opinion that in the interest of uniformity it is expedient that all amendments of Rules should be communicated to the Government of India and to other High Courts before sanction is given to them This we understand can be effected by executive order

If our proposal is adopted it will probably be useful to publish annually in every Province some manual corresponding to the English Annual Practice containing —

(1) the Act

(2) all rules of procedure made under it or under other Acts in the Province

(3) notes of decisions on the Act and Rules

13 We are sensible that there may be defects and flaws in the Bill which we append to this Report The subject is complicated and technical and the time at our disposal has been limited We do not doubt therefore that much improvement may be made in the Bill before it is finally passed into law But in our opinion it is framed on the right lines We believe for the reasons we have stated that in any reform of Civil Procedure it is essential to introduce some elasticity to give wider powers of control to the High Courts and to invest them with a larger discretion in regard to the conduct of cases which come before them Mr Dikshit, ...imate Judge from Bombay has been present throughout our ...ons and we take this opportunity of acknowledging the ... derived from his experience of the working of the

Code in the mofussil We desire also to record our acknowledgments of the services of Mr Law, of the Legislative Department, who has attended to the clerical and press work to our entire satisfaction

Simla, August 31st, 1907

H. ERLE RICHARDS
FRANCIS MACLEAN
LAWRENCE JENKINS
S ISMAY
RASHBEHARY GHOSE

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REPORT OF THE SELECT COMMITTEE.

WE the undersigned Members of the Select Committee to which the Bill to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature was referred have considered the Bill and the papers noted in the appendix and have now the honour to submit this our Report with the Bill as amended by us annexed thereto

2 The chief feature of novelty in the Bill is the re arrangement of the clauses and the relegation of minor provisions to a schedule which may be altered by High Courts We find from the papers before us that this scheme has met with the approval of every Local Government and of all the High Courts in India In our opinion it will give a much needed elasticity to our judicial procedure and will enable minor defects to be remedied as they arise without resort to the Legislature and we recommend it to the Council We have introduced two changes into Part X of the Bill relating to the rule making powers In the first place we have provided that rules must be published before they are made the result will be that section 23 of the General Clauses Act will apply and that there will be an opportunity for the public to offer criticisms on any proposals for alterations of procedure before those proposals are finally passed into law We have also made a change in the composition of the Rule Committees It has been suggested by more than one authority that the interests of the Mofussil were not sufficiently represented on those Committees as constituted under the Bill We recognise the force of this criticism and have accordingly provided that there shall be a Subordinate Judge on each Rule Committee and that the Vakil or Pleader on the Committee shall be enrolled but need not be actising in the High Court so that a Vakil or Pleader practising the Mofussil will be eligible We further recommend that the ill shall not come into operation until the 1st January 1909, in order that the public and the profession may have an opportunity of making themselves familiar with the re arrangement

3 We have carefully considered the criticisms on the Bill as introduced and the changes which we recommend are summarised below It will be observed that we do not advise any departures of importance from the conclusions of the Special Committee which met at Simla during the past summer That Committee had before it a mass of opinions from judicial and other authorities all over India dealing with every point of civil procedure and they arrived at their conclusions only after a careful consideration of those opinions We should not therefore in any case have dissented from them without strong reason but in our judgment those conclusions are right and we accept them Since the Bill was introduced it has been again examined and revised by some of our Colleagues and the criticisms on it have been digested in the Legislative Department By these means our deliberations have been much expedited

4 CLAUSES

Clause 2 (2)—The definition of decree has been generally accepted

Clause 11—We have restored the word former and have inserted explanation I on the suggestion of Sir Bhashyam Iyengar to remove a conflict of authority as to the meaning of the expression former suit

Explanation I has been omitted We think it is liable to misconstruction and that the law is well established apart from the explanation

Clause 22—We have omitted clause 22 of the Bill as introduced as in our opinion it is unnecessary We think that sufficient provision is made for transfers under the succeeding clause

Clause 23—We have omitted the proviso which compelled applications to the High Courts under this clause to be made through the District Court This in our opinion merely duplicates applications and is undesirable

Clause 25—Clause 25 of the Bill as introduced has been rendered unnecessary by the omission of clause 22 We have accordingly taken it out and have put in its place a new clause taking power for the Governor General in Council to transfer cases from one High Court to another under certain circumstances We think that the exercise of such a power may somtimes be necessary

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Clause 61 —The words ' be exempted from liability to attachment or sale in execution of a decree have been substituted for the words be released from attachment and shall be free from liability to sale in execution of a decree in order to make it clear that the exemption extends to produce which has been hypothecated

Clause 62—has been brought into line with clause 55 as now amended

Clause 66 (1) —The wording has been altered on the suggestion of the Hon ble Mr Justice Aikman so as to put the meaning beyond doubt

Clause 79 (2)—This saving was accepted by the Select Committee of 1903 and we think it desirable to have it in the Bill in order to avoid possible doubt

Clause 92 (1) —It has been suggested to us by several authorities that Local Governments should be empowered to invest Courts subordinate to District Courts with power to try cases under this clause and we think that this suggestion should be accepted The necessary words have been added

Clause 96 (3) of the Bill as introduced has been omitted The case law on the subject is sufficiently clear and considerable objection has been taken to the sub clause

Clause 98 —The wording of the proviso has been altered, it now deals only with the decision on the point of law referred

Clause 104 —Sub clause (1) (v) has been added in order to give a right of appeal against the decision of the Court on a special case, *this is in accordance with the recommendation of the* Special Committee but appears to have been omitted from the Bill by mistake

Clause 107 —Sub clause (1) is new We think it desirable to have in the body of the Code a general provision about the powers of an Appellate Court

Clause 134—is new It supplies an omission

Clauses 142 *and* 143—have been brought up from the Rules We think they should be in the body of the Code

Clause 144 —Sub clause (2) has been added on the suggestion of the Calcutta High Court We agree that restitution which may

be obtained by application under this clause should not be made the subject of a separate suit

5 SCHEDULE I

Order I

Rules 1 *and* 3 —The words act or have been added before the word transaction

Rule 3 —This rule has been amplified so as to bring it into line with rule 1

Rule 5 —The words cause of action have been struck out They have given rise to considerable difficulty in England

Rule 8 —We have on the suggestion of the Advocate General of Madras added the words or for the benefit of after the words on behalf of

Order III

Rule 4 (3) —We have adopted the alternative draft suggested by the Simla Committee in their report

Order VI

Rule 18 We have substituted the words he shall not be permitted to amend as the case may be for the words such order to amend become void

Order VII

Rule 17 (1)—On the suggestion of the British Indian Association the word account has been substituted for the word book

Order IX

Rule 4—We have struck out the provisions about limitation contained in this rule These provisions will be incorporated in Bill to consolidate and amend the Limitation Act

Rule 13—We think it necessary to provide specially for cases in which it may not be possible to set aside the decree as against the applicant only

Order XX

Rule 18—This rule has been altered so as to correspond with the amended clause 54

Order XXI

Rule 1 (2)—This sub rule has been inserted on the suggestion of the British Indian Association

Rule 7—The words or of the jurisdiction of the Court which passed it' have been omitted In our opinion a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it

Rule 20—This rule is new It is inserted in order to make it clear that the provisions as to cross decrees and cross claims apply to the case of mortgage decrees The rule also makes it clear that the expression decree for the payment of money' and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge

Rule 45—We have decided to recommend the omission of this rule from the Bill It was taken from the Bill of 1903 but met with considerable criticism and strong objection has been taken to it by the Madras Board of Revenue and the British Indian Association In our opinion the procedure prescribed in this rule is cumbrous and there would be little or no practical advantage from it

Rule 90—The words or fraud have been added after the word irregularity We think that the existing law as contained in section 311 of the present Code is defective the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is unlike an order made on an application under section 311 a decree and open to second appeal This result which often involves a considerable prolongation of these proceedings, is in our opinion undesirable We think that applications for the setting aside of sales should so far as the procedure applicable to them is concerned stand on the same footing whether they are based on the ground of irregularity or on the ground of fraud

Rules 95 *and* 96—We have struck out the provisions about limitation contained in these rules We agree with the Hon ble Mr Justice Miller that it would be more appropriate to incorporate them in the Limitation Act and we have suggested their incorporation in the Bill to amend and consolidate that Act which is now before Council

Order XXII

Rules 3 *and* 4—Rules 3 and 4 have been amended so as to provide that if no application for substitution is made within the time allowed by law the suit shall abate We have struck out the

provision that the Court may make an order declaring the abatement as in our opinion it is unnecessary and likely to give rise to difficulty

Rule 6—The provision as to antedating the judgment has been struck out and in its stead we suggest a provision to the effect that the judgment shall have the same force and effect as if it had been pronounced before the death took place In our opinion this is all that is required

Order XXXIV

Some of the rules in this Order have been redrafted

The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree This is in our opinion an omission and we have provided in rules 3 (1) 5 (1) and 8 (1) for the passing of final decrees in such cases

We approve of the proposal to repeal the provisions of section 99 of the Transfer of Property Act We think that those provisions have worked considerable hardship and are not really needed The first part of the section enacts that a mortgagee shall not bring the mortgaged property to sale otherwise than by instituting a suit under section 67 of the Act In so far as it precludes the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage debt it is in our opinion inexpedient it is beyond doubt competent to a mortgagee to purchase the equity of redemption from the mortgagor by an agreement subsequent to and distinct from the mortgage transaction, and we can see no reason why it should not be equally competent to him to have it sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage (*Khararjmal* v *Daim*, L. L R 32 Cal 296 *Lisel* v *Reeve* 1902 A C 461) In so far as it precludes the mortgagee from selling the property under a judgment for the mortgage debt it serves no useful purpose We understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the debt as such and in execution selling the mortgagor's interest in the property, we, however, think that no such provision was needed seeing that under the law as it stood prior to the Act the Courts never allowed the sale of a bare equity of redemption

under a judgment on the covenant (*Syed Eman* v *Rajcoomar* 23 W R 187, *Khara jamal* v *Daim*, I L R 32 Cal 296)

Order XL

Rule 4—We have redrafted this rule on the lines of section 18 (4) of the Provincial Insolvency Act, 1907 We think that the power to imprison receivers is too wide and should be omitted

Order XLI

Rule 24—We have struck out this rule as in our opinion it is unduly restrictive

Order XLIII

Rule 1—We suggest that there should be appeals from orders pronouncing judgment against a party under Order VIII, rule 10, Order X, rule 4 and Order XVI, r 20

These orders are under the present law appealable as decrees, but having regard to the definition of a decree in the Code they would no longer be appealable in that way, and we think it necessary to make them appealable as orders We have also given an appeal against an order made under rule 21 of Order XI

Appendices—The forms have been amplified and, where necessary, redrafted We think that, as now settled, they are an improvement on the forms in the present Code

6 The publication ordered by the Council has been made as follows —

In English

Gazette	*Date*
Gazette of India	7th September, 1907
Fort Saint George Gazette	1st October, 1907
Bombay Government Gazette	3rd October, 1907.
Calcutta Gazette	18th September, 1907
United Provinces of Agra and Oudh Government Gazette	21st September, 1907
Punjab Government Gazette	27th September, 1907.
Burma Gazette	28th September, 1907
Eastern Bengal and Assam Gazette	25th September, 1907.
Central Provinces Gazette	21st September, 1907
Coorg District Gazette	2nd January, 1908
Sind Official Gazette	26th September, 1907.

provision that the Court may make an order declaring the abatement as in our opinion it is unnecessary and likely to give rise to difficulty

Rule 6—The provision as to antedating the judgment has been struck out and in its stead we suggest a provision to the effect that the judgment shall have the same force and effect as if it had been pronounced before the death took place In our opinion this is all that is required

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Punjab Government Gazette	27th September, 1907.
Burma Gazette	28th September, 1907.
Eastern Bengal and Assam Gazette	25th September, 1907.
Central Provinces Gazette	21st September, 1907
Coorg District Gazette	2nd January, 1908
Sind Official Gazette	20th September, 1907

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A Comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908.

Disposal of provisions of Act XIV of 1882.

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
1	1	
2		
Chapter	Omitted	
District	2 (4) and 3	
District Court		
Pleader	2 (15)	
Govt pleader	2 (7)	
Collector	Omitted	
decree	2 (2	
order	2 (14)	
judgment	2 (9)	
judge	2 (8)	
judgment debtor	2 (10)	
decree holder	2 (3)	
'written	Omitted	
signed	2 (20)	

In the Vernaculars

Province	*Language*	*Date*
Madras	Tamil	28th January, 1908
	Telugu	7th and 28th Jan, 1908
	Kanarese	7th January, 1908
	Malayalam	
Bombay	Marathi	29th January, 1908
	Gujrati	
	Kanarese	
Bengal	Bengali	21st January, 1908
	Hindi	17th December, 1907
	Uriya	27th December, 1907
United Provinces	Urdu	18th January, 1908
Punjab	Urdu	17th January, 1908
Eastern Bengal and Assam	Bengali	8th February, 1908
Coorg	Kanarese	1st February 1908
	Marathi	

7 We think that the Bill has not been so altered as to require re-publication and we recommend that it be passed as now amended

The 12th February, 1908

H ERLE RICHARDS
MADHO LAL
H A SIM
RASHBEHARY GHOSE
S ISMAY
MG BAH TOO

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
18	19	
19	17	
20	Omitted	
21	Omitted	
22	22 23 (1)	
23	22 23 (2)	
24 paras 1 and 3	22 23 (3)	
24 para 2	Omitted	
25	24	
26		O I, rr 1, 4 (a)
27		O I, r 10 (1)
28		O I, rr 3 4 (b)
29		„ r 6
30		„ r 8 (1)
31		„ r 9
32		„ rr 8 (2), 10 (2), (3), (5), 11
33		„ r 10 (4)
34		„ r 13,
35		„ r 12
36		O III, r 1
37		„ r 2
38		„ r 3
39		„ r 4

Section of Act XIV of 1882		Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
40	...	.	O. III, r. 5.
41	..	..	„ r 6
42	...	...	O. II, r 1
43	..		„ r 2
44	...		„ rr 4, 5.
45			„ rr 3 6
46	.	...	Cf O II, rr 6, 7
47			
48	..	26	O IV, r 1
49	.	Cf 137	
50	.	...	O VII, rr 1,2,4,5,6.
51		..	O VI, rr 14, 15 (1)
52			„ r 15 (2), (3)
53			„ r. 17, O. VII, r 1
54	..	.	O VII, r 11, Cf O VI, r 18
55	...	.	„ r. 12
56	.	....	„ r 13
57	...	.....	„ r. 10
58	...	....	„ r 9
58, last para	...	.....	O.IV, r. 2.
59	...	......	O. VII, r. 14.
60	...	......	„ r 15
61	...	......	„ r. 16

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
62		O VII, r 17
63		r 18
64	27	O V r 1
65		r 2
66		r 3
67		r 4
68		r 5
69		r 6
70		r 7
71	...	r 8
72		r 9
73		r 10
74		r 11
75		r 12
76		r 13
77		r 14
78		r 15
79		r 16
80		r 17
81		r 18
82		rr 19 20 (1)
83		r 20 (2)
84		" r 20 (3)

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
85	28	O. V, rr. 21, 23
86		r. 22
87		rr. 24, 29
88		
89		r. 25
90		r. 26
91		r. 30 (1) (2)
92		r. 30 (3)
93		O. XLVIII, r. 1
94	142	r. 2
95	143	r. 3
96		O. IX, r. 1
97		r. 2
98		r. 3
99		O. IX, r. 4
99A		r. 5
100		r. 6
101		r. 7
102		r. 8
103		" r. 9
104	Omitted	
105		O. IX, r. 10
106		" r. 11

Section of Act XIV of 1882	Croresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
107		O IX r 12
108		„ r 13
109		r 14
110		O VIII, r 1
111		r 6
112		, r 9
113		r 10
114		*Cf* O VI r 2
115		, rr 14, 15
116		rr 16 17
117		O X r 1
118		r 2
119		r 3
120		r 4
121		O XI r 1
122		*Cf* O XLVIII r 2
123		O XI r 3
124		r 5
125		r 6
126		r 8
127		r 11
128		O XII r 2
129		O XI r 12 13

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
174		O XVI rr 10 to 13 17 18
175		
176		r 19
177		r 20
178		r 21
179		O XVIII rr 1 2 (1)
180		rr 2 (2) (3) 3
181		r 4
182		r 5
183		r 6
184		r 8
185		r 9
185A 1st & 2nd paras	138	
185A 3rd para		O XVIII r 7
186		r 10
187		r 11
188		r 12
189		r 13
190		r 14
191		r 15
192		r 16
193		r 17
194		O XIX r 1

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
195 ..		O XIX, r 2
196 .	.	„ r 3
197 ...	139	
198	33	O XX, r 1
199		„ r 2
200	Cf 137	
201		
202 ...		O XX, r 3
203		„ r 4
204		„ r 5
205		„ r 7
206, 1st and 2nd paras		, r 6
206, third para	152	
207		O XX, r 9
208		, r 10
209	34	
210		O XX r 11
211	2 12)	„ r 12
212		
213		„ r 13
214		, r 14
215		r 15.
215		, r. 16

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
174		O XVI rr 10 to 13 17 18
175		
176		r 19
177		r 20
178		r 21
179		O XVIII rr 1 2 (1)
180		rr 2 (2) (3) 3
181		r 4
182		r 5
183		r 6
184		r 8
185		r 9
185A 1st & 2nd paras	138	
185A 3rd para		O XVIII r 7
186		r 10
187		r 11
188		r 12
189		r 13
190		r 14
191		r 15
192		r 16
193		r 17
		O XIX r 1

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
231		O XXI r 15
232		r 16
233	49	
234	50	
235		O XXI r 11 (2)
236		r 12
237		r 13
238		r 14
239		r 26(1) (2
240		r 26 (3)
241		r 27
242		r 28
243		r 29
244	47	
245		O XXI r 17
245A	56	
245B		O XXI r 57
246		r 18
247		r 19
248		r 22
249		r 23
250		r 24 (1)
251		rr 24(2), (3) 25(1

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
252	52	
253	cf 145	
254		O XXI r 30
255		r 42
256		r 11 (1)
257		r 1
257A	Omitted	
258		O XXI r 2
259		r 31
260		r 32
261		r 34(1) to (4)
262		" r 34 (5)
263		r 35
264		r 36
265	54	
266	60	
267		O XXI r 41
268		, r 46
269		" r 43
270		, r 51
271	62	
272		O XXI, r 52
273		r 53

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
274 ...		O XXI, r 54
275		" r 55
276	64	
277		O XXI, r 56
278		, r 58
279		" r. 59
280		, r 60
281		" r 61
282		, r 62
283		r 63
284		r 64
285	63	
286		, r 65
287		, rr 66, 70
288	Omitted	
289		" r 67
290		r 68
291		, r 69
292		r 73
293		, r 71
294		, r 72
295	73	
296		O XXI r 76

Section Act XIV of 1882	Corresponding Section Act V of 1908	Corresponding Order and Rule of Act V of 1908
297		O XXI r 77
298		r 78
299		r 79 (1)
300		r 79 (2)
301		r 79 (3)
302		80
303		r 81
304		r 82
305		r 83
306		r 84
307		r 85
308		r 86
309		r 87
310		r 88
310A		r 89
311		r 90
312		r 9[illegible]
313		r 91
314		r 92
315		r 93
316	65	r 94
317	66	
318		O XXI, r 95

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
319		O XXI r 96
320	68, 70 & 71	
321	The Third Schedule	
322		
322A		
322B		
322C		
322D		
323		
324		
324A		
325		
325A		
325B		
325C		
326	72	
327	67	
328		O XXI r 97
329		„ r 98
330		„ r 98
331		r 99
332		„ rr 100,101,103
333		r 102
334		„ rr 97, 98
335		„ rr 97, 99, 103

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
336	55	
337		O XXI r 38
337A		r 40
338	57	
339		O XXI r 39 (1) to (4)
340		r 39 (5)
341	58	
342		
343		O XXI r 25
344—360A	Repealed by the Provincial Insolvency Act 1907	
361		O XXII r 1
362		r 2
363		r 3 (1)
364	Omitted repealed by Act VII of 1888 s 32 (1)	
365		r 3 (1)
366		r 3 (2)
367		" r 5
368		r 4
369		r 7
370		r 8
371		r 9 (1) (2)
372		r 10
372A		r 9 (3)

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908.
373		O XXIII, r 1
374		r 2
375		r 3
375A		r 4
376		O XXIV r 1
377		r 2
378		r 3
379		r 4
380		O XXV r 1 (1) (3)
381		r 2
382		r 1 (2)
383		O XXVI r 1
384		r 2
385		r 3
386	76	r 4
387		r 5
388		r 6
389		r 7
390		r 8
391	78	
392		O XXVI, r 9
393 ...		" r 10.
394 .		" r 11.

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
395		O XXVI, r 12
396		rr 13, 14
397		r 15
398		r 16
399		r 17
400		„ r 18
401		O XXXIII, r 1
402	Omitted	
403		O XXXIII, r 2
404		r 3
405		r 5
406		r 4
407		„ r 5
408		r 6
409		r 7
410		r 8
411		„ r 10
412		r 11
413 .		r 15
414 ...		. r 9
415	.	„ r 16
416 .	79	O XXVII, r 1
417 ...	..	„ r 2

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
418		O XXVII, r 3
419		„ r 4
420		r 5
421		r 6
422		O V, r 27
423		O XXVII r 7
424	80	
425	81	
426, 427		O XXVII, r 8
428	81	
429	82	
430	83	
431	84	
432	85	
433	86	
434	87	
435		O XXIX r 1
436		rr 2 3
437		O XXXI r 1
438		r 2
439		r 3
440		O XXXII, rr 1, 4 (2)

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
441		O XXXII, r 5 (1)
442		r 2
443		rr 3 (1), 4 (2)
444		r 5 (2)
445		r 4 (1)
446		r 9
447		r 8
448		r 10 (1)
449		r 10 (2)
450		r 12 (1)
451		r 12 (2), (3)
452		r 12 (4)
453		r 12 (5)
454		r 13
455		r 14
456		rr 3 (2), (3), 4 (4)
457		r 4 (1)
458		r 11 (1)
459		r 11 (2)
460	Omitted	
461		O XXXII, r 6
462		r 7
463		r 15

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.	Corresponding Order and Rule of Act V of 1908.
464 ...	... ..	O. XXXII, r. 16.
465 ...	...	O XXVIII, r. 1.
466 ...	......	" r. 2
467 ...	......	" r. 3.
468 ...	... ..	O.V, rr. 28, 29.
470 ...	88	
471	. ...	O.XXXV, r. 1.
472 ..	... .	" r. 2.
473 ...	.. ...	" r. 4
474 ...	......	" r. 5.
475	......	" r. 6.
476 ...	......	" r. 3.
477, 478 ...	......	O XXXVIII, r. 1.
479 ..	...	" r 2
480 ...	.. .	O. XXXVIII, r. 3
481 ...	...	" r. 4.
482 ..., 483 ..., 484 .	.. .	" r. 5.
485 .		" r. 6.
486 .	.	" r 8.
487 ...	.. ...	" r. 9.

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
441		O XXXII, r 5 (1)
442		r 2
443		rr 3 (1) 4 (2)
444		r 5 (2)
445		r 4 (1)
446		r 9
447		r 8
448		r 10 (1)
449		r 10 (2)
450		r 12 (1)
451		r 12 (2) (3)
452		r 12 (4)
453		r 12 (5)
454		r 13
455		r 14
456		rr 3 (2) (3) 4 (4)
457		r 4 (1)
458		r 11 (1)
459		r 11 (2)
460	*Omitted*	
461		O XXXII r 6
462		r 7
463		r 15

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
511	The Second Schedule	
512		
513		
514		
515		
516		
517		
518		
519		
520		
521		
522		
523		
524		
525		
526		
527	90	O XXXVI r 1
528		r 2
529		r 3
530		r 4
531		r 5
532		O XXXVII, r 2
533		r 3

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.	Corresponding Order and Rule of Act V of 1908.
534	... ..	O.XXXVII, r. 4.
535 ...	...	" r. 5.
536 ...	.. ...	" r. 6.
537 ..	.....	" r. 7
538 ...	...	" r. 1.
539 ...	92 and 93	
540 ...	96	
541 ...	. ...	O. XLI, r. 1.
542 ...	. .	" r. 2.
543 ..	... ..	" r. 3.
544 ...	. .	" r 4
545 ...	... ..	" r. 5.
546 ...	. . ..	" r. 6.
547 ...	.. ...	" r. 7.
548 ...	.. ...	" r. 9
549 ...	...	" r 10.
550 ...	.....	" r. 13
551 ...	......	O. XLI, r. 11.
552 ...	......	" r. 12.
553 ...	......	" r. 14.
554 ...	......	" r. 15.
555 ..	......	" r. 16.
556 ...	......	" r. 17.

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule, Act V of 1908
557		O XLI r 18
558		r 19
559		r 20
560		r 21
561		r 22
562		r 23
564	Omitted	
565		O XLI, r 24
566		r 25
567		r 26
568		r 27
569		r 28
570		r 29
571		r 30
572	*Cf* 137	
573		
574		O XLI r 31
575	98	
576		O XLI, r 34
577		r 32
578	99	
579		O XLI, r 35
580		r 36

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
581		O XLI r 37
582	107 (2)	O XXII r 11
582A	*Cf* 146	
583	144 (1)	
584	100	
585	101	
586	102	
587	108	
588	104	O XLIII r 1
589	106	
590	108	O XLIII r 2
591	105	
592		O XLIV r 1
593		r 2
594		O XLV r 1
595	109	
596	110	
597	111	
598		O XLV r 2
600		r 3
601		r 6
602		r 7
603		r 8

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
604		O XLV, r 9
605		r 10
606		r 11
607		r 12
608		r 13
609		r 14
610		r 15
611		r 16
612	Omitted	
613	Omitted	
615	Omitted	
616	112	
617	113	O XLVI r 1
618		r 2
619		r 3
620		r 4
621		r 5
622	115	
623	114	O XLVII r 1
624		r 2
625		r 3
626		r 4
627		r 5

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
628		O XLVII r 6
629		„ rr 7, 9
630		„ r 8
631	116	
632	117	
633	122	
634	118	
635	119	
636	.	O XLIX, r 1
637 .	128 (2) (i)	
638	120 (1)	O XLIX, r 3
639	120 (2)	
640	132	
641 .	133	
642	135	
643	Omitted	
644	.	O XLVIII, r 4
645 ...	137	
645A .. .	140	
646 ...	Omitted	
646A	... ..	O XLVI, r. 6
646B	....	„ r. 7.
647	141	

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Corresponding Order and Rule of Act V of 1908
648	136	
649	36 37	
650	Omitted	
650A	29	
652	122 129 130 and 131	
653	59	

THE CODE OF CIVIL PROCEDURE.

ACT V OF 1908.



An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature, It is hereby enacted as follows —

PRELIMINARY

Short title commencement and extent

1 (1) This Act may be cited as the Code of Civil Procedure, 1908 Sec 1

(2) It shall come into force on the first day of January, 1909

(3) This section and sections 155 to 158 extend to the whole of British India the rest of the Code extends to the whole of British India, except the Scheduled Districts

Definitions

2 In this Act, unless there is anything repugnant in the subject or context,— Sec 2

(1) "Code" includes rules

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144 but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

r

(b) any order of dismissal for default

Explanation—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of It is final when such adjudication completely disposes of the suit It may be partly preliminary and partly final

(3) "decree holder" means any person in whose favour a decree has been passed or an order capable of execution has been made

(4) 'district means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court") and includes the local limits of the ordinary original civil jurisdiction of a High Court

(5) 'foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or *continued by the Governor General in Council*

(6) foreign judgment' means the judgment of a foreign Court

(7) 'Government Pleader' includes any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader

(8) "Judge means the presiding officer of a Civil Court

(9) "judgment' means the statement given by the judge of the grounds of a decree or order

(10) 'judgment debtor' means any person against whom a decree has been passed or an order capable of execution has been made

New. (11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession Sec 211, Expl

(13) "moveable property" includes growing crops New

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate a vakil and an attorney of a High Court

(16) "prescribed" means prescribed by rules

(17) "public officer" means a person falling under any of the following descriptions, namely —

(*a*) every Judge

(*b*) every member of the Indian Civil Service,

(*c*) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government

(*d*) every officer of a Court of Justice whose duty it is as such officer to investigate or report on any matter of law or fact, or to make, authenticate or keep any document or to take charge or dispose of any property or to execute any judicial process or to administer any oath or to interpret or to preserve order in the Court, and every person especially authorized by a Court of Justice to perform any of such duties,

(*e*) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement,

(*f*) every officer of the Government whose duty it is as such officer, to prevent

offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience,

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate or to report on, any matter affecting the pecuniary interests of the Government, or to make authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds and

(20) "signed" save in the case of a judgment or decree, includes stamped

Sec. 2

Subordination of Courts.

3 For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court

Sec 4

Savings

4 (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred,

or any special form of procedure prescribed by or under any other law for the time being in force

(2) In particular and without prejudice to the generality of the proposition contained in sub section (1) nothing in this Code shall be deemed to limit or otherwise affect any remedy which a land holder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land

Application of the Code to Revenue Courts

5 (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent the Local Government with the previous sanction of the Governor General in Council may by notification in the local official Gazette declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts or shall only apply to them with such modifications as the Local Government with the sanction aforesaid may prescribe Sec 4A

(2) Revenue Court in sub section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent revenue or profits of land used for agricultural purposes but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature

Pecuniary jurisdiction

6 Save in so far as is otherwise expressly provided nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction Sec 6 last para

Provincial Small Cause Courts

7 The following provisions shall not extend to Courts constituted under the Provincial Small Causes Courts Act 1887 or to Courts exercising the jurisdiction of a Court of Small Causes under that Act that is to say,— Sec 5

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes,

(ii) the execution of decrees in such suits,

(iii) the execution of decrees against immoveable property, and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 so far as they relate to injunctions and interlocutory orders, and

sections 96 to 112 and 115

Sec 8

Presidency Small Cause Courts

8 Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, (XV of 1882) the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay

PART I.

SUITS IN GENERAL

Jurisdiction of the Courts and Res Judicata

9 The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred Sec 11

Courts to try all civil suits unless barred

Explanation —A suit in which the right to property or to an office is contested is a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies

10 No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed or in any Court beyond the limits of British India established or continued by the Governor General in Council and having like jurisdiction or before His Majesty in Council Sec 12

Stay of suits

Explanation —The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action

11 No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same Sec 13

Res judicata

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes,

(ii) the execution of decrees in such suits,

(iii) the execution of decrees against immoveable property, and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 so far as they relate to injunctions and interlocutory orders, and

sections 96 to 112 and 115

Sec 8

Presidency Small Cause Courts

8 Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c) 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, (XV of 1882) the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay

whom they or any of them claim litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction,

(b) where it has not been given on the merits of the case,

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable,

(d) where the proceedings in which the judgment was obtained are opposed to natural justice,

(e) where it has been obtained by fraud,

(f) where it sustains a claim founded on a breach of any law in force in British India

Presumption as to foreign judgments

14 The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction Sec 13 Expl VI

PLACE OF SUING

Court in which suits to be instituted

15 Every suit shall be instituted in the Court of the lowest grade competent to try it Sec 15

Suits to be instituted where subject matter situate

16 Subject to the pecuniary or other limitations prescribed by any law, suits— Sec 16

(a) for the recovery of immoveable property with or without rent or profits,

(b) for the partition of immoveable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,

(d) for the determination of any other right to or interest in immoveable property,

(e) for compensation for wrong to immoveable property,

(f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate

Provided that a suit to obtain relief respecting or compensation for wrong to immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain

Explanation —In this section "property" means property situate in British India

Sec 19

Suits for immoveable property situate within jurisdiction of different Courts

17 Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate

Provided that in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court

Sec 16A.

Place of institution of suits where local limits of jurisdiction of Courts are uncertain

18. (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property

were situate within the local limits of its jurisdiction

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction

(2) Where a statement has not been recorded under sub section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate the appellate or revisional Court shall not allow the objection unless in its opinion there was at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice

Suits for compensation for wrongs to person or movables

19 Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business or personally works for gain, within the local limits of the jurisdiction of another Court the suit may be instituted at the option of the plaintiff in either of the said Courts Sec 18

Illustrations

(a) A residing in Delhi beats B in Calcutta B may sue A either in Calcutta or in Delhi

(b) A residing in Delhi publishes in Calcutta statements defamatory of B B may sue A either in Calcutta or in Delhi

Other suits to be instituted where defendants reside or cause of action arises

20 Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction— Sec 17

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or

carries on business, or personally works for gain, or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid acquiesce in such institution or

(c) the cause of action wholly or in part, arises

Explanation I—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence

Explanation II—A corporation shall be deemed to carry on business at its sole or principal office in British India or in respect of any cause of action arising at any place where it has also a subordinate office, at such place

Illustrations

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B by his agent in Calcutta buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta where the cause of action has arisen or in Delhi where B carries on business

(b) A resides at Simla B at Calcutta and C at Delhi. A B and C being together at Benares B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Benares where the cause of action arose. He may also sue them at Calcutta where B resides or at Delhi where C resides, but in each of these cases if the non resident defendant objects the suit cannot proceed without the leave of the Court.

Sec 10 A (2) Objections to jurisdiction

21 No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such

objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice

22 Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed Sec 22

Power to transfer suits which may be instituted in more than one Court

23 (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court Secs 23 24

To what Court application lies

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate

24 (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage— Sec 25

General power of transfer and withdrawal.

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same, or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn

(2) Where any suit or proceeding has been transferred or withdrawn under sub section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes

New

Power of Governor General in Council to transfer suit

25 (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor General in Council, who may, by notification in the Gazette of India, transfer such suit, appeal or proceeding to any other High Court

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proce[illegible] was originally instituted ought to have appl[illegible] such case

Institution of Suits

26 Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed — Sec 48

Institution of suits

Summons and Discovery

27 Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed — Sec 64

Summons to defendant

28 (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province — Sec 85

Service of summons where defendant resides in another province

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto

29 Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts — Sec 650A

Service of foreign summonses

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor General in Council, or that the Governor General in Council has, by notification in the Gazette of India, declared the provisions of this section to apply to such Courts

30 Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,— — New

Power to order discovery and the like

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of inter-

rogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence,

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid,

(c) order any fact to be proved by affidavit

New — Summons to witness

31 The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects

New — Penalty for default

32 The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

(a) issue a warrant for his arrest

(b) attach and sell his property,

(c) impose a fine upon him not exceeding five hundred rupees

(d) order him to furnish security for his appearance and in default commit him to the civil prison

JUDGMENT AND DECREE

Sec 198 — Judgment and decree

33 The Court after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow

INTEREST

Sec 209 — Interest

34 (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with

further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest and a separate suit therefor shall not lie

Costs

Costs

5 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers Sec. 5 Judicature Act 1890

(2) Where the Court directs that any costs shall not follow the event, the Courts shall state its reasons in writing Sec 220

(3) The Court may give interest on costs at any rate not exceeding six per cent per annum and such interest shall be added to the costs and shall be recoverable as such Sec 222

PART II.

EXECUTION

General

New

Application to orders

36 The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders

Sec 649 Expl

Definition of Court which passed a decree

37 The expression "Court which passed a decree," or words to that effect, shall in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit

Courts by which Decrees may be executed

Sec 223, Para 1

Court by which decree may be executed

38 A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution

Sec 223 Paras 2 3

Transfer of decree

39 (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

(*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business or personally works for gain within the local limits of the jurisdiction of such other Court or

(*b*) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court or

(*c*) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it or

(*d*) if the Court which passed the decree considers for any other reason which it shall record in writing that the decree should be executed by such other Court

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction

Transfer of decree to Court in another province

40 Where a decree is sent for execution in another province it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province New

Result of execution proceedings to be certified

41 The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure Sec 223 4th Para

Powers of Court in executing transferred decree

42 The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the Sec 228

PART II.

EXECUTION.

General

New

36 The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders

Application to orders

Sec 649 Expl

37 The expression "Court which passed a decree" or words to that effect, shall in relation to the execution of decrees unless there is anything repugnant in the subject or context, be deemed to include —

Definition of Court which passed a decree

(*a*) where the decree to be executed has been passed in the exercise of appellate jurisdiction the Court of first instance, and

(*b*) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree would have jurisdiction to try such suit

Courts by which decrees may be executed

Sec 223, Para 1

38 A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution

Court by which decree may be executed

Sec 223 Paras 2, 3

39 (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

Transfer of decree

competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

Questions to be determined by the Court executing decree

47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit Sec. 244.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation —For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit

LIMIT OF TIME FOR EXECUTION

Sec 230 Paras 3 4

Execution barred in certain cases

48 (1) Where an application to execute a decree not being a decree granting an injunction has been made no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

(a) the date of the decree sought to be executed or

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years where the judgment debtor has, by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application or

(b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act 1877 (XV of 1877)

TRANSFEREES AND LEGAL REPRESENTATIVES

Sec 233

Transferee

49 Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment debtor might have enforced against the original decree holder

50 (1) Where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased　Sec 234

Legal representative

(2) Where the decree is executed against such legal representative he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of and for the purpose of ascertaining such liability the Court executing the decree may, of its own motion or on the application of the decree holder compel such legal representative to produce such accounts as it thinks fit

PROCEDURE IN EXECUTION

51 Subject to such conditions and limitations as may be prescribed the Court may on the application of the decree holder order execution of the decree—　New

Powers of Court to enforce execution

(a) by delivery of any property specifically decreed

(b) by attachment and sale or by sale without attachment of any property

(c) by arrest and detention in prison

(d) by appointing a receiver or

(e) in such other manner as the nature of *the relief granted may require*

52 (1) Where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased it may be executed by the attachment and sale of any such property　Sec 252

Enforcement of decree against legal representative

(2) Where no such property remains in the possession of the judgment debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession the decree may be executed

LIMIT OF TIME FOR EXECUTION

Sec 230, Paras 3 4

Execution barred in certain cases

48 (1) Where an application to execute a decree not being a decree granting an injunction has been made no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

(*a*) the date of the decree sought to be executed or

(*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

(2) Nothing in this section shall be deemed—

(*a*) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment debtor has, by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application or

(*b*) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act 1877 (XV of 1877)

TRANSFEREES AND LEGAL REPRESENTATIVES

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Legal representative

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of, and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree holder, compel such legal representative to produce such accounts as it thinks fit

Procedure in Execution

New

51 Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree—

Powers of Court to enforce execution

(*a*) by delivery of any property specifically decreed,

(*b*) by attachment and sale or by sale without attachment of any property,

(*c*) by arrest and detention in prison

(*d*) by appointing a receiver, or

(*e*) in such other manner as the nature of the relief granted may require

52 (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property Sec 252

Enforcement of decree against legal representative

(2) Where no such property remains in the possession of the judgment debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed

against the judgment debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally

New **53** For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative

Liability of ancestral property

Sec 265. **54** Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates

Partition of estate or separation of share

Arrest and detention

Sec 336 **55** (1) A judgment debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained

Arrest and detention

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such

dwelling house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling house he may break open the door of any room in which he has reason to believe the judgment debtor is to be found

Provided, thirdly that if the room is in the actual occupancy of a woman who is not the judgment debtor and who according to the customs of the country does not appear in public the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing may enter the room for the purpose of making the arrest

Provided fourthly that, where the decree in execution of which a judgment debtor is arrested is a decree for the payment of money and the judgment debtor pays the amount of the decree and the costs of the arrest to the officer arresting him such officer shall at once release him

(2) The Local Government may by notification in the local official Gazette declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf

(3) Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the Court the Court shall inform him that he may apply to be declared an insolvent and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force

(4) Where a judgment debtor expresses his intention to apply to be declared an insolvent and

furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court shall release him from arrest and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree

Sec 245 A

Prohibition of arrest or detention of women in execution of decree for money

56 Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money

Sec 338

Subsistence allowance

57 The Local Government may fix scales, graduated according to rank, race and nationality of monthly allowances payable for the subsistence of judgment debtors

Sec 342

Detention and release

58 (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,

(b) in any other case, for a period of six weeks

Sec 341

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii) without the order of the Court

(2) A judgment debtor released from detention under this section shall not merely by reason of his release be discharged from his debt but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison

59 (1) At any time after a warrant for the arrest of a judgment debtor has been issued the Court may cancel it on the ground of his serious illness Sec 653

Release on ground of illness

(2) Where a judgment debtor has been arrested the Court may release him if in its opinion he is not in a fit state of health to be detained in the civil prison

(3) Where a judgment debtor has been committed to the civil prison he may be released therefrom—

(*a*) by the Local Government on the ground of the existence of any infectious or contagious disease or

(*b*) by the committing Court or any Court to which that Court is subordinate on the ground of his suffering from any serious illness

(4) A judgment debtor released under this section may be re-arrested but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58

Attachment

60 (1) The following property is liable to attachment and sale in execution of a decree namely lands houses or other buildings goods money, bank notes cheques bills of exchange hundis promissory notes Government securities bonds or other securities for money debts shares in a corporation and save as herein Sec 266

Property liable to attachment and sale in execution of decree

after mentioned, all other saleable property moveable or immoveable belonging to the judgment debtor or over which or the profits of which, he has a disposing power which he may exercise for his own benefit whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf

Provided that the following particulars shall not be liable to such attachment or sale namely —

(a) the necessary wearing apparel cooking vessels beds and bedding of the judgment debtor his wife and children and such personal ornaments as in accordance with religious usage cannot be parted with by any woman

(b) tools of artizans and where the judgment debtor is an agriculturist his implements of husbandry and such cattle and seed grain as may, in the opinion of the Court be necessary to enable him to earn his livelihood as such and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him

(d) books of account,

(e) a mere right to sue for damages

(f) any right of personal service

(g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor General in Council in this behalf and political pensions

(*h*) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty ;

(*i*) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (*h*), while on duty, to the extent of—

(*i*) the whole of the salary, where the salary does not exceed twenty rupees monthly ;

(*ii*) twenty rupees monthly, where the salary exceeds twenty rupees and does not exceed forty rupees monthly ; and

(*iii*) one moiety of the salary in any other case ;

(*j*) the pay and allowances of persons to whom the Indian Articles of War apply ;

(*k*) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment ;

(*l*) the wages of labourers and domestic servants whether payable in money or in kind ;

(*m*) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;

(*n*) a right to future maintenance ;

(*o*) any allowance declared by any law passed under the Indian Councils Acts, 1861 and 1892 to be exempt from liability to attachment or sale in execution of a decree ; and,

(*p*) where the judgment debtor is a person liable for the payment of land revenue, any moveable property which under

any law for the time being applicable to him is exempt from sale for the recovery of an arrear of such revenue

Explanation—The particulars mentioned in clauses (*g*) (*h*), (*i*), (*j*) (*l*) and (*o*) are exempt from attachment or sale whether before or after they are actually payable

(2) Nothing in this section shall be deemed—

(*a*) to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house building, site or land, or

(*b*) to affect the provisions of the Army Act or of any similar law for the time being in force

New

Partial exemption of agricultural produce

61 The Local Government, with the previous sanction of the Governor General in Council, may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment debtor and his family shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree

Sec 271

Seizure of property in dwelling house

62 (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling house after sunset and before sunrise

(2) No outer door of a dwelling-house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has

duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw, and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

Property attached in execution of decrees of several Courts.

63 (1) Where property not in the custody of any court is under attachment in excution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. Sec 285.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees. New

Private alienation of property after attachment to be void.

64 Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. Sec 276

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

SALE

New. **65** Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute

Purchaser's title

Sec 317 **66** (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner

Sec 327 **67** The Local Government, with the previous sanction of the Governor General in Council, may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value

Power for Local Government to make rules as to sales of land in execution of decrees for payment of money

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY

Sec 320 **68** The Local Government may, with the previous sanction of the Governor General in Council, declare, by notification in the local official Gazette, that in any local area the

Power to prescribe rules for transferring to Collector execution of certain decrees

execution of decrees in cases in which a Court has ordered any immoveable property to be sold or the execution of any particular kind of such decrees or the execution of decrees ordering the sale of any particular kind of or interest in immoveable property shall be transferred to the Collector

Provisions of Third Schedule to apply

69 The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section　New

Rules of procedure

70 (1) The Local Government may make rules consistent with the aforesaid provisions—　Sec 320 Paras 2 3

(a) for the transmission of the decree from the Court to the Collector and for regulating the procedure of the Collector and his subordinates in executing the same and for retransmitting the decree from the Collector to the Court

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector or orders made on appeal with respect to such orders being subject to appeal to and revision by superior revenue authorities as nearly as may be as the orders made by the Court or orders made on appeal with respect to such orders would be subject to appeal to and revision by appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector

Sec. 320, Para 4

Jurisdiction of Civil Courts barred

(2) A power conferred by rules made under sub section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exerciseable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court

Sec 320, Para 5

Collector deemed to be acting judicially

71 In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

Sec 326.

Where Court may authorize Collector to stay public sale of land

72 (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable

Distribution of Assets

Sec 295

Proceeds of execution sale to be rateably distributed among decree holders

73. (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons

Provided as follows —

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge the Court may, with the consent of the mortgagee or incumbrancer order that the property be sold free from the mortgage or charge giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold

(c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon the proceeds of sale shall be applied—

first in defraying the expenses of the sale

secondly in discharging the amount due under the decree

thirdly in discharging the interest and principal monies due on subsequent incumbrances (if any) and

fourthly rateably among the holders of decrees for the payment of money against the judgment debtor, who have prior to the sale of the property applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets

(3) Nothing in this section affects any right of the Government

Resistance to Execution.

Sec 330

Resistance to execution

74 Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree holder or purchaser, order the judgment debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree holder or purchaser be put into possession of the property.

PART III.

INCIDENTAL PROCEEDINGS.

COMMISSIONS

75 Subject to such conditions and limitations as may be prescribed, the Court may issue a commission— New.

Power of Court to issue commissions

(a) to examine any person,
(b) to make a local investigation,
(c) to examine or adjust accounts or
(d) to make a partition

76 (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides Sec 386

Commission to another Court

(2) Every Court receiving a commission for the examination of any person under sub section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order

77 In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India New

Letter of request

78 The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by— Sec 391

Commissions issued by foreign Courts

(a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor General in Council, or

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country for the time being in alliance with His Majesty

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PART IV.

SUITS IN PARTICULAR CASES

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

Suits by or against Government

79 (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council Sec 416

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by section 111 of the East India Company Act 1813

Notice

80 No suit shall be instituted against the Secretary of State for India in Council or against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been in the case of the Secretary of State in Council delivered to or left at the office of a Secretary to the Local Government or the Collector of the district and in the case of a public officer delivered to him or left at his office stating the cause of action the name description and place of residence of the plaintiff and the relief which he claims and the plaint shall contain a statement that such notice has been so delivered or left Sec 424

Exemption from arrest and personal appearance

81 In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity— Secs 425 428

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service it shall exempt him from appearing in person

Sec 429 **82** (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid a time shall be specified in the decree within which it shall be satisfied and if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government

Execution of decree

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report

Suits by Aliens and by or against Foreign and Native Rulers

Sec 430 **83** (1) Alien enemies residing in British India with the permission of the Governor General in Council, and alien friends may sue in the Courts of British India as if they were subjects of His Majesty

When aliens may sue

(2) No alien enemy residing in British India without such permission or residing in a foreign country, shall sue in any of such Courts

Explanation —Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of his Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of sub section (2), be deemed to be an alien enemy residing in a foreign country

Sec 431 **84** (1) A foreign State may sue in any Court of British India

When foreign States may sue

Provided that such State has been recognized by His Majesty or by the Governor General in Council

Provided also that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor General in Council

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs

85 (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief whether in subordinate alliance with the British Government or otherwise and whether residing within or without British India or at the request of any person competent in the opinion of the Government to act on behalf of such Prince or Chief to prosecute or defend any suit on his behalf shall be deemed to be the recognized agents by whom appearances acts and applications under this Code may be made or done on behalf of such Prince or Chief Sec 432

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto

Suits against Princes, Chiefs, ambassadors and envoys

86 (1) Any such Prince or Chief and any ambassador or envoy of a foreign State may with the consent of the Governor General in Council certified by the signature of a Secretary to the Government of India but not Sec 433

without such consent, be sued in any competent Court

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued, but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the persons desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince Chief ambassador or envoy

(4) The Governor General in Council may, by notification in the Gazette of India, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing subsections to the Governor General in Council and a Secretary to the Government of India, respectively

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property

Sec 434 — Style of Princes and Chiefs as parties to suits

87 A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State

Provided that in giving the consent referred to in the foregoing section the Governor General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name

INTERPLEADER

88 Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself Sec 470

Where interpleader suit may be instituted

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted

PART V.

SPECIAL PROCEEDINGS.

Arbitration

Sec 506

Arbitration

89 (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code

Special Case

Sec 527

Power to state case for opinion of Court

90 Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed

Suits relating to Public Matters

New

Public nuisances

91 (1) In the case of a public nuisance the Advocate General, or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions

Public charities

92 (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate to obtain a decree— Sec 539

(a) removing any trustee

(b) appointing a new trustee

(c) vesting any property in a trustee

(d) directing accounts and inquiries

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust

(f) authorizing the whole or any part of the trust property to be let sold mortgaged or exchanged

(g) settling a scheme or

(h) granting such further or other relief as the nature of the case may require

(2) Save as provided by the Religious Endowments Act 1863 no suit claiming any of the reliefs specified in sub section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub section

Exercise of powers of Advocate General outside Presidency towns

93 The powers conferred by sections 91 and 92 on the Advocate General may, outside the Presidency towns be, with the previous sanction of the Local Government exercised also by the Collector or by such officer as the Local Government may appoint in this behalf Sec 539, last para.

PART VI.

SUPPLEMENTAL PROCEEDINGS

New

Supplemental proceedings

94 In order to prevent the ends of justice from being defeated the Court may if it is so prescribed —

(*a*) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance and if he fails to comply with any order for security commit him to the civil prison

(*b*) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property

(*c*) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold

(*d*) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property,

(*e*) make such other interlocutory orders as may appear to the Court to be just and convenient

Secs. 491 497

Compensation for obtaining arrest attachment or injunction on insufficient grounds

95 (1) Where in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section —

(*a*) it appears to the Court that such arrest attachment or injunction was applied for on insufficient grounds or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same

the defendant may apply to the Court and the Court may upon such application award against the plaintiff by its order such amount not exceeding one thousand rupees as it deems a reasonable compensation to the defendant for the expense or injury caused to him

Provided that a Court shall not award under this section an amount exceeding the limits of its pecuniary jurisdiction

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest attachment or injunction

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PART VII.

APPEALS

Appeals from Original Decrees

Sec 540

Appeal from original decree

96 (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court

(2) An appeal may lie from an original decree passed *ex parte*

(3) No appeal shall lie from a decree passed by the Court with the consent of parties

New

Appeal from final decree where no appeal from preliminary decree

97 Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree

Sec 575

Decision where appeal heard by two or more Judges

98 (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from such decree shall be confirmed

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon

h they differ, and the appeal shall then be upon that point only by one or more of the Judges and such point shall be decided ing to the opinion of the majority (if any) of Judges who have heard the appeal including e who first heard it

99 No decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court Sec 578

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction

Appeals from Appellate Decrees

100 (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds namely — Sec 584

Second appeal

(a) the decision being contrary to law or to some usage having the force of law

(b) the decision having failed to determine some material issue of law or usage having the force of law

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits

(2) An appeal may lie under this section from an appellate decree passed *ex parte*

101 No second appeal shall lie except on the grounds mentioned in section 100 Sec. 585

No second appeal on other grounds

Sec 586

102 No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees

No second appeal in certain suits

New

103 In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal but not determined by the lower appellate Court

Power of High Court to determine issues of fact

APPEALS FROM ORDERS

Sec 588

104. (1) An appeal shall lie from the following orders and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders —

Order from which appeal lies

(*a*) an order superseding an arbitration where the award has not been completed within the period allowed by the Court

(*b*) an order on an award stated in the form of a special case

(*c*) an order modifying or correcting an award

(*d*) an order filing or refusing to file an agreement to refer to arbitration

(*e*) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration

(*f*) an order filing or refusing to file an award in an arbitration without the intervention of the Court,

(*g*) an order under section 95

(*h*) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree,

(*i*) any order made under rules from which an appeal is expressly allowed by rules

(2) No appeal shall lie from any order passed in appeal under this section

105 (1) Save as otherwise expressly provided no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction but, where a decree is appealed from any error defect or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal Sec 591

Other orders

(2) Notwithstanding anything contained in sub section (1) where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness

106 Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction then to the High Court Sec 589

What Courts to hear appeal

GENERAL PROVISIONS RELATING TO APPEALS

107 (1) Subject to such conditions and limitations as may be prescribed an Appellate Court shall have power— New

Powers of Appellate Court

(*a*) to determine a case finally

(*b*) to remand a case

(*c*) to frame issues and refer them for trial

(*d*) to take additional evidence or to require such evidence to be taken

(2) Subject as aforesaid the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein Sec. 582 Para 1

Secs 587, 590

108 The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

Procedure in appeals from appellate decrees and orders

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided

APPEALS TO THE KING IN COUNCIL

Sec 595

109 Subject to such rules as may, from time to time be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained an appeal shall lie to His Majesty in Council—

When appeals lie to King in Council

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction,

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction and

(c) from any decree or order, when the case, as hereinafter provided is certified to be a fit one for appeal to His Majesty in Council

Sec 596

110 In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

Value of subject matter

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order,

the appeal must involve some substantial question of law

111 Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council— Sec 597

Bar of certain appeals

(a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act 1861 or of one Judge of a Division Court or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being, or

(b) from any decree from which under section 102 no second appeal lies

Savings

112 (1) Nothing contained in this Code shall be deemed— Sec 616

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council and for the time being in force, for the presentation of appeals to His Majesty in Council or their conduct before the said Judicial Committee

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice admiralty jurisdiction or to appeals from orders and decrees of Prize Courts

PART VIII.

REFERENCE, REVIEW AND REVISION.

Sec 617

Reference to High Court

113 Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit

Sec 623

Review

114 Subject as aforesaid, any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is allowed by this Code or

(*c*) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order and the Court may make such order thereon as it thinks fit

Sec 622

Revision

115 The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(*a*) to have exercised a jurisdiction not vested in it by law or

(*b*) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit

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PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS

Sec 631

Part to apply only to certain High Courts

116 This Part applies only to High Courts which are or may hereafter be established under the Indian High Courts Act 1861

Sec 632

Application of Code to High Courts

117 Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts

Sec 634

Execution of decree before ascertainment of costs

118 Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation the Court may order that the decree shall be executed forthwith except as to so much thereof as relates to the costs

and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation

Sec 635

Unauthorized persons not to address Court

119 Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys

Provisions not applicable to High Court in original civil or insolvent jurisdiction

Secs 638, 639

120. (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20

(2) Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court

PART X.

RULES

New — *Effect of rules in First Schedule.*

121. The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

New — *Power of certain High Courts to make rules.*

122. High Courts established under the Indian High Courts Act, 1861, and the Chief Courts of the Punjab and Lower Burma may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

New — *Constitution of Rule Committees at certain towns.*

123. (1) A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon.

(2) Each such Committee shall consist of the following persons, namely:—

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years,

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and

(*e*) in the towns of Calcutta, Madras and Bombay, an attorney

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two and the Chief Justice or Chief Judge shall be the President of the Committee

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf, and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor General in Council or by the Local Government, as the case may be

Committee to report to High Court

124 Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration New

Power of other High Courts to make rules

125 High Courts other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor General in Council may determine New



Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court

New — Rules subject to sanction

126 Rules made under the foregoing provisions shall be subject to the previous sanction of the following authorities, namely —

(*a*) if the rule is made by a High Court established under the Indian High Courts Act, 1861, to the sanction of the authority prescribed by section 15 of that Act for rules made under that section

(*b*) if the rule is made by any other High Court, to the sanction of the Local Government

New — Publication of rules

127 Rules so made and sanctioned shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule

New — Matters for which rules may provide

128 (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely —

(*a*) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service ,

(*b*) the maintenance and custody, while under attachment, of live stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live stock and property and the proceeds of such sale ,

(*c*) procedure in suits by way of counter claim, and the valuation of such suits for the purposes of jurisdiction

(*d*) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts

(*e*) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not

(*f*) summary procedure—

(*i*) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising—

on a contract express or implied or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only or

on a trust , or

(*ii*) in suits for the recovery of immoveable property with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit or has become liable to forfeiture for non

payment of rent, or against persons claiming under such tenant;

(g) procedure by way of originating summons;

(h) consolidation of suits, appeals and other proceedings;

(i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

Sec 652 Para 3

Power of Chartered High Courts to make rules as to their original civil procedure.

129. Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure *in the exercise of its original civil jurisdiction* as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

Sec 652 Para 2

Power of other High Courts to make rules as to matters other than procedure.

130. A High Court not established under the Indian High Courts Act, 1861, may, with the previous sanction of the Local Government, make with respect to any matter other than procedure any rule which any High Court so established might under section 15 of that Act make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

Sec 652 Para 4

Publication of rules.

131. Rules made in accordance with section 129 or section 130 shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law.

PART XI.

Miscellaneous

132 (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court Sec 640

Exemption of certain women from personal appearance

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code

133 (1) The Local Government may, by notification in the local official Gazette exempt from personal appearance in Court any person whose rank in the opinion of such Government entitles him to the privilege of exemption Sec 641

Exemption of other persons

(2) The names and residences of the persons so exempted shall from time to time be forwarded to the High Court by the Local Government and a list of such persons shall be kept in such Court and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court

(3) Where any person so exempted claims the privilege of such exemption and it is consequently necessary to examine him by commission he shall pay the costs of that commission unless the party requiring his evidence pays such costs

134 The provisions of sections 55, 57 and 59 shall apply so far as may be to all persons arrested under this Code New

Arrest other than in execution of decree

Sec 642

135 (1) *No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court*

Exemption from arrest under civil process

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such *matter, and while returning from such tribunal*

(3) Nothing in sub section 2 shall enable a judgment debtor to claim exemption from arrest under an order for immediate execution or where such judgment debtor attends to show cause why he should not be committed to prison in execution of a decree

Sec 648

136 (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and sent to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment

Procedure where person to be arrested or property to be attached is outside district

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him

(4) Where a person to be arrested or moveable property to be attached under this section is *within the local limits of the ordinary original civil* jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court

137 (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise directs **Sec 645**

Language of subordinate Courts

(2) The *Local Government* may *declare* what shall be the language of any such Court and in what character application to and proceedings in such Court shall be written

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English but if any party or his pleader is unacquainted with English a translation into the language of the Court shall at his request be supplied to him and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation **New**

Sec 185 A

Power for Local Government to require evidence to be recorded in English

138 (1) The Local Government may, by notification in the local official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1) he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court

Sec 197

Oath on affidavit by whom to be administered

139 In the case of any affidavit under this Code—

(a) any Court or Magistrate or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf

may administer the oath to the deponent

Sec 645 A

Assessors in causes of salvage, etc

140 (1) In any Admiralty or Vice Admiralty cause of salvage towage or collision the Court whether it be exercising its original or its appellate jurisdiction may if it thinks fit and shall upon request of either party to such cause summon to its assistance in such manner as it may direct or as may be prescribed two competent assessors and such assessors shall attend and assist accordingly

(2) Every such assessor shall receive such fees for his attendance to be paid by such of the parties as the Court may direct or as may be prescribed

Sec 647

Miscellaneous proceedings

141 The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any Court of civil jurisdiction

Orders and notices to be in writing

142 All orders and notices served on or given to any person under the provisions of this Code shall be in writing — Sec 94

Postage

143 Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same shall be paid within a time to be fixed before the communication is made — Sec 95

Provided that the Local Government, with the previous sanction of the Governor General in Council, may remit such postage or fee, or both, or may prescribe a scale of court fees to be levied in lieu thereof

Application for restitution

144 (1) Where and in so far as a decree is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise cause such restitution to be made as will so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and for this purpose the Court may make any orders, including orders for the refund of costs and for the payment of interest damages, compensation and mesne profits which are properly consequential on such variation or reversal — Sec 583

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub section (1) — New

Enforcement of liability of surety

145 Where any person has become liable as surety — Sec 253

(a) for the performance of any decree or any part thereof or

(b) for the restitution of any property taken in execution of a decree

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47

Provided that such notice as the Court in each case thinks sufficient has been given to the surety

New

Proceedings by or against representatives

146 Save as otherwise provided by this Code or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him

New

Consent or agreement by persons under disability

147 In all suits to which any person under disability is a party any consent or agreement as to any proceeding shall if given or made with the express leave of the Court by the next friend or guardian for the suit have the same force and effect as if such person were under no disability and had given such consent or made such agreement

New

Enlargement of time

148 Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired

New

Power to make up deficiency of court fees

149 Where the whole or any part of any fee prescribed for any document by the law for the time in force relating to court fees has not been paid, the Court may, in its dis

cretion, at any stage, allow the person, by whom such fee is payable to pay the whole or part as the case may be, of such court fee, and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance

150 Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred New

Transfer of business

151 Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court New

Saving of inherent powers of Court

152 Clerical or arithmetical mistakes in judgments decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties O 28 r 11 (E R)

Amendment of judgments decrees or orders

153 *The Court may at any time and on* such terms as to costs or otherwise as it may think fit amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding O 28 r 12 E R)

General power to amend

154 Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement Sec 3 Para 3

Saving of present right of appeal

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal be deemed a party within the meaning of section 47

Provided that such notice as the Court in each case thinks sufficient has been given to the surety

New

Proceedings by or against representatives

146 Save as otherwise provided by this Code or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him

New

Consent or agreement by persons under disability

147 In all suits to which any person under disability is a party any consent or agreement as to any proceeding shall if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement

New

Enlargement of time

148 Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired

New

Power to make up deficiency of court fees

149 Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the Court may, in its dis

cretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be of such court fee, and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance

Transfer of business

150 Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred New

Saving of inherent powers of Court

151 Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court New

Amendment of judgments, decrees or orders

152 Clerical or arithmetical mistakes in judgments decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties O 28 r 11 (E R)

General power to amend

153 *The Court may at any time and on* such terms as to costs or otherwise as it may think fit amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding O 28 r 12 (E R)

Saving of present right of appeal

154 Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement Sec 3 Para 3

New. **155** The *enactments* mentioned *in* the Fourth Schedule are hereby amended to *the* extent specified in the fourth column thereof

Amendment of certain Acts

Sec 3 **156** The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column *thereof*

Repeals

Sec 3 **157** Notifications published, declarations and *rules* made, places appointed, agreements filed, scales prescribed, *forms* framed appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any *other enactment* hereby repealed shall so far as they are *consistent* with this Code have the same force and effect as if they had been respectively published, made, appointed filed, prescribed, framed and conferred under this Code and by *the authority empowered* thereby in such behalf

Continuance of orders and rules of repealed enactments

Sec 3 Para 2 **158** In every *enactment or notification* passed or issued before the commencement of this Code in which reference is made to *or to* any Chapter or section of Act VIII of 1859 *or* any Code of Civil Procedure or any Act amending the same or any *other* enactment hereby repealed, such reference shall so far as may be practicable, be taken *to* be made to *this* Code or *to* its corresponding Part, Order, section or rule

References to Code of Civil Procedure and other repealed enactments



THE FIRST SCHEDULE.

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Parties to Suits

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2 Power of Court to order separate trials
3 Who may be joined as defendants
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5 Defendant need not be interested in all the relief claimed
6 Joinder of parties liable on same contract
7 When plaintiff in doubt from whom redress is to be sought
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9 Misjoinder and non joinder
10 Suit in name of wrong plaintiff
Court may strike out or add parties
Where defendant added, plaint to be amended
11 Conduct of suit
12 Appearance of one of several plaintiffs or defendants for others
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2 Suit to include the whole claim
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4 Only certain claims to be joined for recovery of immoveable property
5 Claims by or against executor administrator or heir
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Recognized Agents and Pleaders

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1. Appearances etc may be in person by recognized agent or by pleader
2. Recognized agents
3. Service of process on recognized agent
4. Appointment of pleader
5. Service of process on pleader
6. Agent to accept service
   Appointment to be in writing and to be filed in Court

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2. Register of suits

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Issue and Service of Summons

Issue of Summons

1. Summons
2. Copy or statement annexed to summons
3. Court may order defendant or plaintiff to appear in person
4. No party to be ordered to appear in person unless resident within certain limits
5. Summons to be either to settle issues or for final disposal
6. Fixing day for appearance of defendant
7. Summons to order defendant to produce documents relied on by him
8. On issue of summons for final disposal defendant to be directed to produce his witnesses

Service of Summons

9. Delivery or transmission of summons for service
10. Mode of service
11. Service on several defendants
12. Service to be on defendant in person when practicable or on his agent
13. Service on agent by whom defendant carries on business
14. Service on agent in charge in suits for immoveable property

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15 Where service may be on male member of defendant's family
16 Person served to sign acknowledgment
17 Procedure when defendant refuses to accept service, or cannot be found
18 Endorsement of time and manner of service
19 Examination of serving officer
20 Substituted service
Effect of substituted service
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21 Service of summons where defendant resides within jurisdiction of another Court
22 Service within Presidency towns and Rangoon of summons issued by Courts outside
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26 Service in foreign territory through Political Agent or Court
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ORDER XVIII

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ORDER XVII

Adjournments

ORDER XVIII

Hearing of the Suit and Examination of Witnesses

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9 When evidence may be taken in English
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4 Judgments of Small Cause Courts
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8 Procedure where Judge has vacated office before signing decree
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6. Procedure where Court desires that its own decree shall be executed by another Court
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10. Application for execution
11. Oral application
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12. Application for attachment of moveable property not in judgment debtor's possession
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14. Power to require certified extract from Collector's register in certain cases
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18. Execution in case of cross-decrees
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20. Cross-decrees and cross-claims in mortgage-suits
21. [illegible]
22. [illegible] in certain cases
23. [illegible]

RULES

RULES

RULES

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82 What Courts may order sales
83 Postponement of sale to enable judgment debtor to raise amount of decree
84 Deposit by purchaser and re sale on default
85 Time for payment in full of purchase money
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87 Notification on re sale
88 Bid of co sharer to have preference
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91 Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest
92 Sale when to become absolute or be set aside
93 Return of purchase money in certain cases
94 Certificate to purchaser
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97 Resistance or obstruction to possession of immoveable property
98 Resistance or obstruction by judgment debtor
99 Resistance or obstruction by *bona fide* claimant
100 Dispossession by decree holder or purchaser
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1 No abatement by party's death if right to sue survives
2 Procedure where one of several plaintiffs or defendants dies and right to sue survives
3 Procedure in case of death of one of several plaintiffs or of sole plaintiff
4 Procedure in case of death of one of several defendants or of sole defendant
5 Determination of question as to legal representative
6 No abatement by reason of death after hearing
7 Suit not abated by marriage of female party
8 When plaintiff's insolvency bars suit
Procedure where assignee fails to continue suit or give security

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1 Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them
2 Persons so authorized may act personally or appoint pleader
3 Service on person so authorized or on his pleader, to be good service

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1 Subscription and verification of pleading
2 Service on corporation
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1 Suing of partners in name of firm
2 Disclosure of partner s names
3 Service
4 Right of suit on death of partner
5 Notice in what capacity served
6 Appearance of partners
7 No appearance except by partners
8 Appearance under protest
9 Suits between co partners
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1 Representation of beneficiaries in suits concerning property vested in trustees, etc
2 Joinder of trustees, executors and administrators
3 Husband of married executrix not to join

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1 Minor to sue by next friend
2 Where suit is instituted without next friend plaint to be taken off the file
3 Guardian for the suit to be appointed by Court for minor defendant
4 Who may act as next friend or be appointed guardian for the suit
5 Representation of minor by next friend or guardian for the suit
6 Receipt by next friend or guardian for the suit of property under decree for minor
7 Agreement or compromise by next friend or guardian for the suit
8 Retirement of next friend
9 Removal of next friend
10 Stay of proceedings on removal etc of next friend
11 Retirement removal or death of guardian for the suit
12 Course to be followed by minor plaintiff or applicant on attaining majority
13 Where minor co plaintiff attaining majority desires to repudiate suit
14 Unreasonable or improper suit
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1 Suits may be instituted *in forma pauperis*
2 Contents of application
3 Presentation of application
4 Examination of applicant
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5 Rejection of application
6 Notice of day for receiving evidence of applicant's pauperism
7 Procedure at hearing
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9
10
11 Procedure where pauper fails
12 Government may apply for payment of court fees
13 Government to be deemed a party

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Arrest before judgment

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APPENDICES TO THE FIRST SCHEDULE

FORMS

THE FIRST SCHEDULE.

ORDER I

Parties to Suits

1 All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the ernative, where, if such persons brought separate suits, any common ques- n of law or fact would arise — Sec. 26

Who may be joined plaintiffs

2 Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be pedient — New.

Power of Court to ler separate trials

3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or trans... to ... e, where if separate suits ... estion of law or fact would arise — Sec 28

Who may be joined defendants.

Court may give judg nt for or against one more of joint parties

4 Judgment may be given without any amendment— Secs 26, 28

(*a*) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to,

(*b*) against such one or more of the defendants as may be found to be liable according to their respective liabilities

Defendant need not interested in all the lief claimed

5 It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him — New

6 The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes — Sec 29

Joinder of parties li le on same contract

7 Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be etermined as between all parties — New.

When plaintiff in oubt from whom re ress is to be sought

8 (1) Where there are numerous persons having the same interest in one s... one or more of s... — Secs 30, 32.

One person may sue defend on behalf of in same interest

all persons so interested But the Court shall in such case give, at the plaintiff s expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case, may direct

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the Court to be made a party to such suit

Sec 31

Misjoinder and non joinder

9 No suit shall be defeated by reason of the misjoinder or non joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it

Secs 27, 32, 33

Suit in name of wrong plaintiff

10 (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaint ff the Court may at any stage of the suit if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is *necessary for* the determination of the real matter *in* dispute so to do order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just

Court may strike out or add parties

(2) The Court r

that the name of any party improperly joined whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the ques *tions involved in the suit*, be added

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent

Where defendant added plaint to be amended

(4) Where a defendant is added, the plaint shall unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the sum mons and of the plaint shall be served on the new defendant and, if the Court thinks fit on the original defendant

(5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons

Sec 32

Conduct of suit

11 The Court may give the conduct of the suit to such person as it deems proper

Sec 35

Appearance of one of several plaintiffs or defendants for others

12 (1) Where there are more plaintiffs than one any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceed ing, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any o her of them to appear, plead or act for such other in any proceeding

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court

13 All objections on the ground of ... parties shall be tak... port inits and in all cas... or before su h ... objection has subsequently arisen and any s... deemed to have been waived

Objections as to non-joinder or misjoinder

ORDER II

Frame of suit

1 Every suit shall as far as practicable ... ground for final decision u... pute and to prevent further l... hem

Frame of suit

2 (1) Every suit shall include the whole of the cl... tiff is entitled to make in resp... action, but a plaintiff may relinquish ... his claim in order to bring the su... liction of any Court

Suit to include the whole claim

(2) Where a plaintiff omits to sue in respect of or inte... quishes any portion of his claim ... wards sue in respect of the portion ... relinquished

Relinquishment of part of claim

(3) A person entitled to more than one relief in resp... cause of action may sue for all or any ... reliefs but if he omits except with the leave of ... Court to sue for all such reliefs he shall ... ards sue for any relief so omitted

Omission to sue for one of several reliefs

Explanation—For the purposes of this rule an obligati... ateral security for its performance and successive claims arising ... e same obligation shall be deemed respectively to constitute but one ... action

Illustration

A lets a house to B at a yearly rent of Rs 1200 The rent for ... whole of the years 1905 1906 and 1907 is due and unpaid A sues B ... 1908 only for the rent due for 1906 A shall not afterwards sue B for ... due for 1905 or 1907

3 Save as otherwise provided a plaintiff may unite in the same su... several causes of action against the same defendan... or the same defendants jointly and any plaintiff... having causes of action in which they are jointl... nterested against the same defendant or the same defendants jointly ma... te such causes of action in the same suit

Joinder of causes of action

(2) Where causes of action are united the jurisdiction of the Court ... ds the suit shall depend on the amount or value of the aggregate subjec... atters at the date of instituting the suit

Only certain claims to be joined for recovery of immoveable property

4 No cause of action shall unless with the leav... of the Court be joined with a suit for ... of immoveable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof,

(b) claims for damages for breach of any contract under which the property or any part thereof is held, and

(c) claims in which the relief sought is based on the same cause of action

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property

Sec 44 — *Claims by or against executor administrator or heir*

5 No claim by or against an executor, administrator or heir, as such shall be joi ally unless arise with the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to or liable for, jointly with the deceased person whom he represents

Secs 46, 47. — *Power of Court to order separate trials*

6 Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together the Court may order separate trials or make such other order as may be expedient

Sec 46 — *Objections as to misjoinder*

7 All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived

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ORDER III

Recognized Agents and Pleaders

Sec 36 — *Appearances etc may be in person by recognized agent or by pleader*

1 Any appearance, application or act in or to any Court required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognized agent, or by a pleader duly appointed to act on his behalf

Provided that any such appearance shall, if the Court so directs, be made by the party in person

Sec 37. — *Recognized agents*

2 The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers-of attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or busi-

ness only where no other agent is expressly authorized to make and do such appearances applications and acts

Service of process on recognized agent

3 (1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person unless the Court otherwise directs Sec 38

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent

Appointment of pleader

4 (1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power of attorney to act in this behalf Sec 39

(2) Every such appointment when accepted by a pleader shall be filed in Court and shall be considered to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client

(3) No advocate of any High Court established under the Indian High Courts Act 1861, or of any Chief Court and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act

Service of process on pleader

5 Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person Sec 40

Agent to accept service

6 (1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process Sec 41

Appointment to be in writing and to be filed in Court

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or if the appointment is general, a certified copy *thereof shall be filed* in Court

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ORDER IV

Institution of Suits

Suit to be commenced by plaint

1 (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf Sec 48

(2) Every plaint shall comply with the rules contained in Orders VI and VII so far as they are applicable

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof,

(b) claims for damages for breach of any contract under which the property or any part thereof is held and

(c) claims in which the relief sought is based on the same cause of action

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property

Sec 44 Claims by or against executor administrator or heir

5 No claim by or against an executor, administrator or heir as such shall be joined with claims by or against him personally unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor administrator or heir or are such as he was entitled to or liable for, jointly with the deceased person whom he represents

Secs 46 47. Power of Court to order separate trials

6 Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together the Court may order separate trials or make such other order as may be expedient

Sec 46 Objections as to misjoinder

7 All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and in all cases where issues are settled at or before such settlement unless the ground of objection has subsequently arisen and any such objection not so taken shall be deemed to have been waived

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ORDER III

Recognized Agents and Pleaders

Sec 36 Appearances etc may be in person by recognized agent or by pleader

1 Any appearance application or act in or to any Court required or authorized by law to be made or done by a party in such Court, may except where otherwise expressly provided by any law for the time being in force be made or done by the party in person or by his recognized agent or by a pleader duly appointed to act on his behalf

Provided that any such appearance shall, if the Court so directs be made by the party in person

Sec 37 Recognized agents

2 The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers-of attorney, authorizing them to make and do such appearances applications and acts on behalf of such parties,

(b) persons carrying on trade or business for and in the names of parties not resident . . . of the Court within w . . . is made or done,

Provided that in every suit heard by a Court of Small Causes the summons shall be for the final disposal of the suit

6 The day for the appearance of the defendant shall be fixed with reference to the current business of the Court the place of residence of the defendant and the time necessary for the service of the summons and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day Sec 69

Fixing day for appearance of defendant

7 The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case Sec 70

Summons to order defendant to produce documents relied on by him

8 Where the summons is for the final disposal of the suit it shall also direct the defendant to produce on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case Sec 71

On issue of summons for final disposal defendant to be directed to produce his witnesses

Service of Summons

9 (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted or has an agent resident within that jurisdiction who is empowered to accept the service of the summons the summons shall unless the Court otherwise directs be delivered or sent to the proper officer to be served by him or one of his subordinates Sec 72

Delivery or transmission of summons for service

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct

10 Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court Sec 73

Mode of service

11 Save as otherwise prescribed, where there are more defendants than one service of the summons shall be made on each defendant Sec 74

Service on several defendants

12 Wherever it is practicable service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient Sec 75

Service to be on defendant in person when practicable or on his agent

13 (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent who at the time of service, personally carries on such business or work for such person within such limits shall be deemed good service Sec 76

Service on agent by whom defendant carries on business

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer

Sec 58 — Register of suits

2 The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits Such entries shall be numbered in every year according to the order in which the plaints are admitted

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ORDER V.

Issue and Service of Summons

Issue of Summons

Sec 64 — Summons

1 (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff s claim

(2) A defendant to whom a summons has been issued under sub rule (1) may appear—

(*a*) in person or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some person able to answer all such questions

(3) Every such summons shall be signed by the Judge or such officer as he appoints and shall be sealed with the seal of the Court

Sec 65 — Copy or statement annexed to summons

2 Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement

Sec 66 — Court may order defendant or plaintiff to appear in person

3 (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance

Sec 67 — No party to be ordered to appear in person unless resident within certain limits

4 No party shall be ordered to appear in person unless he resides—

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court house

Sec 68 — Summons to be either to settle issues or for final disposal

5 The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit, and the summons shall contain a direction accordingly

he house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the Court thinks fit

Effect of substituted service

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally Sec 83

Where service substituted time for appearance to be fixed

(3) Where service is substituted by order of the Court the Court shall fix such time for the appearance of the defendant as the case may require Sec 84

Service of summons where defendant resides within jurisdiction of another Court

21 A summons may be sent by the Court by which it is issued, whether within or without the province either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides Sec 85

Service within Presidency towns and Rangoon of summons issued by Courts outside

22 Where a summons issued by any Court established beyond the limits of the towns of Calcutta Madras Bombay and Rangoon is to be served within any such limits it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served Sec 86

Duty of Court to which summons is sent

23 The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto Sec 85

Service on defendant in prison

24 Where the defendant is confined in a prison the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant Secs 87, 88

Service where defendant resides out of British India and has no agent

25 Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post if there is postal communication between such place and the place where the Court is situate Sec 89

Service in foreign territory through Political Agent or Court

26 Where— Sec 90

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor General in Council, a Political Agent has been appointed or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Governor General in Council has, by notification in the Gazette of India declared that any summons so issued may be served by any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid,

the summons may be sent to such Political Agent or Court by post or otherwise for the purpose of being served upon the defendant, and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service

Sec. 77.

Service on agent in charge in suits for immoveable property

14 Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property

Sec 78

Where service may be on male member of defendant's family

15 Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him

Explanation —A servant is not a member of the family within the meaning of this rule

Sec 79

Person served to sign acknowledgment

16 Where the serving officer del
mons to the def
or other person
signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons

Sec 80

Procedure when defendant refuses to accept service, or cannot be found

17 Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued, with a report endorsed thereon annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed

Sec 81

Endorsement of time and manner of service

18 The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex or cause to be endorsed or annexed, on or to the original summons, a return stating the time *when* and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Sec 82

Examination of serving officer

19 Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit

Sec 82, Para 2.

Substituted service

20 (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of

4 In all cases in which the party pleading relies on any misrepresentation fraud breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall stated in the pleading O 19, r 6 (E R)

Particulars to be ven where necessary

5 A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just O 19, r 7 (E R)

Further and better atement, or particu rs

6 Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, s the case may be, and, subject thereto, an averment of the performance r occurrence of all conditions precedent necessary for the case of the laintiff or defendant shall be implied in his pleading O 19, r 14 (E R)

Condition precedent

7 No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the arty pleading the same O 19, r 16 (E R)

Departure

8 Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a lenial of the legality or sufficiency in law of such contract O 19, r 20 (E R)

Denial of contract

9 Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material O 19, r 21 (E R)

Effect of document to be stated

10 Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred O 19, r 22 (E R)

Malice, knowledge etc

11 Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred are material O 19, r 23 (E R)

Notice

12 Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, O 19, r 24 (E R)
or rela-
tion as [illegible] circum-
stances person
so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative

Implied contract, or relation

Sec 422

Service on civil public officer or on servant of railway company or local authority

27 Where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian Marine Service) or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served send it for service on the defendant to the head of the office in which he is employed together with a copy to be retained by the defendant

Sec 468

Service on soldiers

28 Where the defendant is a soldier the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant

Sec 468

Duty of person to whom summons is delivered or sent for service

29 (1) Where a summons is delivered or sent to any person for service under rule 24 rule 27 or rule 28 such person shall be bound to serve it if possible and to return it under his signature with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service and such statement shall be deemed to be evidence of non service

Sec 91

Substitution of letter for summons

30 (1) The Court may notwithstanding anything hereinbefore contained substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf where the defendant is, in the opinion of the Court of a rank entitling him to such mark of consideration

(2) A letter substituted under sub rule (1) shall contain all the particulars required to be stated in a summons, and subject to the provisions of sub rule (3) shall be treated in all respects as a summons

Sec 92

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court or in any other manner which the Court thinks fit, and where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent

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ORDER VI

Pleadings generally

New

Pleading

1 'Pleading' shall mean plaint or written statement

O 19 r 4 (E R)

Pleading to state material facts and not evidence

2 Every pleading shall contain and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be but not the evidence by which they are to be proved and shall when necessary, be divided into paragraphs, numbered consecutively Dates sums and numbers shall be expressed in figures

O 19 r 5 (E R)

Forms of pleading

3 The forms in Appendix A when applicable, and where they are not applicable forms of the like character as nearly as may be, shall be used for all pleadings

(*d*) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect,

(*e*) the facts constituting the cause of action and when it arose,

(*f*) the facts showing that the Court has jurisdiction,

(*g*) the relief which the plaintiff claims,

(*h*) where the plaintiff has allowed a set off or relinquished a portion of his claim the amount so allowed or relinquished, and

(*i*) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits

n money suits

2 Where the plaintiff seeks the recovery of money the plaint shall state the precise amount umed　Sec 50

But where the plaintiff sues for mesne profits or for an amount which ll be found due to him on taking unsettled accounts between him and e defendant, the plaint shall state approximately the amount sued for

Where the subject atter of the suit is imoveable property

3 Where the subject matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and in case such property can be identified by boundaries or numbers in a cord of settlement or survey, the plaint shall specify such boundaries or umbers　Sec 50, Para 3

When plaintiff sues representative

4 Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute suit concerning it　Sec 50, Para 4

Defendant s interest id liability to be own laintiff s demand

5 The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the　Sec 50, Para 5

Grounds of exemption rom limitation law

6 Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed　Sec 50, Para 6

Relief to be specifical y stated

7 Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think ust to the same extent as if it had been asked for And the same rule shall apply to any relief claimed by the defendant in his written statement　O 20, r 6 (E R)

Relief founded on eparate grounds

8 Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly　O 20, r. 7. (E R)

Procedure on admit ting plaint

9 (1) *The plaintiff shall endorse on the plaint, or annex thereto, a* list of the documents (if any) which he has produced along with it, and, if the plaint is admitted, shall present as many copies on plain paper of the　Sec 58.

O 19, r 25 (E R) — Presumptions of law

13 Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied, (*e g* consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim)

Sec. 51 — Pleading to be signed

14 Every pleading shall be signed by the party and his pleader (if any) *Provided that where a party pleading is*, by reason of absence or for other good cause, unable to sign the pleading it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf

Sec 51 — Verification of pleadings

15 (*1*) Save as otherwise provided by any law for the time being in force every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved, to the satisfaction of the Court to be acquainted with the facts of the case

(*2*) The person verifying shall specify by reference to the numbered *paragraphs of the pleading what he verifies of his own knowledge* and what he verifies upon information received and believed to be true

(*3*) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed

O 19 r 27 (E R) — Striking out pleadings

16 The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice embarrass or delay the fair trial of the suit

Sec 53 — *Amendment of pleadings*

17 The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties

Sec 53 — Failure to amend after order

18 If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order or if no time is thereby limited then within fourteen days from the date of the order he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days as the case may be, unless the time is extended by the Court

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ORDER VII

Plaint

Sec 50 — Particulars to be contained in plaint

1. The plaint shall contain the following particulars —

(*a*) the name of the Court in which the suit is brought,

(*b*) the name, description and place of residence of the plaintiff,

(*c*) the name, description and place of residence of the defendant so far as they can be ascertained,

tatement in case of m nts not in his ses ion or power

15 Where any such document is not in the possession or power of the plaintiff he shall, if possible state in whose possession or power it is Sec 60

16 Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost and an indemnity is given by the plaintiff, to the satisfaction of the Court against the claims of any other person such instrument the Court may pass such decree as it would have ssed if the plaintiff had produced the instrument in Court when the plaint presented and had at the same time delivered a copy of the instrument be filed with the plaint Sec 61

its on lost neg ti le instruments

17 (1) Save in so far as is otherwise provided by the Bankers Books Evidence Act 1891 where the document on which the plaintiff sues is an entry in a shop book or other account in his possession or power the plaintiff shall oduce the book or account at th time of filing the plaint together with a py of the entry on which he relies Sec 62

Production of shop

(2) The Court or such officer as it appoints in this behalf shall forth with mark the document for the purpose of identification and after examining and comparing the copy with the original shall if it is found correct certify to be so and return the book to the plaintiff and cause the copy to be filed

Original entry to be arked and returned

18 (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint and which is not produced or entered accordingly shall ot, without the leave of the Court be received in evidence on his behalf at he hearing of the suit Sec 63

Inadmissibility of ocument not produced hen plaint filed

(2) Nothing in this rule applies to documents produced for cross mination of the defendant s witnesses or in answer to any case set up by e defendant or handed to a witness merely to refresh his memory

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ORDER VIII

Written Statement and Set off

1 The defendant may and if so required by the Court shall at or before the first hearing or within such time as the Court may permit present a written statement of his nce Sec 110

Written statement

2 The defendant must raise by his pleading all matters which show the suit not to be maintainable or that the transaction is either void or voidable in point of law, and all such grounds of defence as if not raised would be ikely to take the opposite party by surprise or would raise issues of fact not sing out of the plaint as for instance fraud limitation release payment performance or facts showing illegality O 19 r 15 (E R)

New facts must be ally pleaded

plaint as there are defendants unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements

Concise statements

(2) Where the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity such statements shall show in what capacity the plaintiff or defendant sues or is sued

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination he finds them to be correct

Sec 57

Return of plaint

10 (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted

Procedure on returning plaint

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return the name of the party presenting it, and a brief statement of the reasons for returning it

Secs 53, 54

Rejection of plaint

11 The plaint shall be rejected in the following cases —

(a) where it does not disclose a cause of action

(b) where the relief claimed is undervalued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so

(d) where the suit appears from the statement in the plaint to be barred by any law

Sec 55

Procedure on rejecting plaint

12 Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order

Sec 56

Where rejection of plaint does not preclude presentation of fresh plaint

13 The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action

Documents relied on in plaint

Sec 59

Production of document on which plaintiff sues

14 (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint

List of other documents

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

Statement in case of documents not in his possession or power

15 Where any such document is not in the possession or power of the plaintiff, he shall, if possible state in whose possession or power it is Sec 60

Suits on lost negotiable instruments

16 Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint Sec 61.

Production of shop book

17 (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act 1891 where the document on which the plaintiff sues is an entry in a shop book or other account in his possession or power the plaintiff shall produce the book or account at the time of filing the plaint together with a copy of the entry on which he relies Sec 62

Original entry to be marked and returned

(2) The Court, or such officer as it appoints in this behalf shall forthwith mark the document for the purpose of identification and, after examining and comparing the copy with the original, shall if it is found correct certify it to be so and return the book to the plaintiff and cause the copy to be filed

Inadmissibility of document not produced when plaint filed

18 (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint and which is not produced or entered accordingly shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit Sec 63

(2) Nothing in this rule applies to documents produced for cross examination of the defendant's witnesses or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory

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ORDER VIII

Written Statement and Set off

Written statement

1 The defendant may, and, if so required by the Court, shall at or before the first hearing or within such time as the Court may permit, present a written statement of his defence Sec 110

New facts must be specially pleaded

2 The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as if not raised, would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release payment performance, or facts showing illegality O 19, r 15 (E R)

O 19, r 17 (E R)

Denial to be specific

3 It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages

O 19, r 19 (E R)

Evasive denial

4 Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance Thus if it is alleged that he received a certain sum of money it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received And if an allegation is made with divers circumstances it shall not be sufficient to deny it along with those circumstances

O 19, r 13 (E R)

Specific denial

5 Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted except as against a person under disability

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission

Sec 111

Particulars of set off to be given in written statement

6 (1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary limits of the jurisdiction of the Court and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit but not afterwards unless permitted by the Court present a written statement containing the particulars of the debt sought to be set off

Effect of set off

(2) The written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set off but this shall not affect the lien upon the amount decreed of any pleader in respect of the costs payable to him under the decree

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set off

Illustrations

(a) A bequeaths Rs 2,000 to B and appoints C his executor and residuary legatee B dies and D takes out administration to B's effects C pays Rs 1,000 as surety for D then D sues C for the legacy C cannot set off the debt of Rs 1,000 against the legacy for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs 1,000

(b) A dies intestate and in debt to B C takes out administration to A's effects and B buys part of the effects from C In a suit for the purchase money by C against B the latter cannot set off the debt against the price for C fills two different characters one as the vendor to B in which he sues B and the other as representative to A

(c) A sues B on a bill of exchange B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set off The amount not being ascertained cannot be set off

(d) A sues B on a bill of exchange for Rs 500 B holds a judgment against A for Rs 1,000 The two claims being both definite pecuniary demands may be set off

(e) A sues B for compensation on account of trespass B holds a promissory note for Rs 1,000 from A and claims to set off that amount against any sum that A may recover in the suit B may do so for as soon as A recovers, both sums are definite pecuniary demands

(f) A and B sue C for Rs 1 000 C cannot set off a debt due to him by alone

(g) A sues B and C for Rs 1,000 B cannot set off a debt due to him alone A

(h) A owes the partnership firm of B and C Rs 1 000 B dies leaving C surviving A sues C for a debt of Rs 1500 due in his separate character C may set off the debt of Rs 1 000

Defence or set off founded on separate grounds

7 Where the defendant relies upon several distinct grounds of defence or set off founded upon separate and distinct facts, they shall be stated as far as may be, separately and distinctly O 20, r 7 (E R)

New ground of defence

8 Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set off may be raised by the defendant or plaintiff, as the case may be, in his written statement New

Subsequent pleadings

9 No pleading subsequent to the written statement of a defendant other than by way of defence to a set off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same Sec 112.

Procedure when party fails to present written statement called for by Court

10 Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit Sec 113

ORDER IX

Appearance of Parties and Consequence of Non appearance

Parties to appear on day fixed in summons for defendant to appear and answer

1 On the day fixed in the summons for the defendant to appear and answer the parties shall be in attendance at the Court house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court Sec 96

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs

2 Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed Sec 97

Provided that no such order shall be made although the summons has not been served upon the defendant if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent

Where neither party appears, suit to be dismissed

3 Where neither party appears when the suit is called on for hearing the Court may make an order that the suit be dismissed Sec 98

Sec 99

Plaintiff may bring fresh suit or Court may restore suit to file

4 Where a suit is dismissed under rule 2 or rule 3 the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside and if he satisfies the Court that there was sufficient cause for his not paying the court fee and postal charges (if any) required within the time fixed before the issue of the summons or for his non appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit

Sec 99A

Dismissal of suit where plaintiff after summons returned unserved fails for a year to apply for fresh summons

5 (1) Where *after a summons has been issued to the defendant*, or to one of several defendants and returned unserved the plaintiff fails for a period of one year from the date of the return made to the Court by the officer ordinarily certifying to the Court returns *made by the serving officers to apply for the issue* of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process the Court may make an order that the suit be dismissed as against such defendant

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit

Sec 100

Procedure when only plaintiff appears

6 (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then—

When summons duly served

(a) if it is proved that the summons was duly served, the court may proceed *ex parte*,

When summons not duly served

(b) if *it is not proved* that the *summons* was duly served the Court shall direct a second summons to be issued and served on the defendant,

When summons served but not in due time

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed *in the summons*, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court and shall direct notice of such day to be given to the defendant

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement

Sec 101

Procedure where defendant appears on day of adjourned hearing *and assigns good cause for previous non appearance*

7 Where the Court has adjourned the hearing of the suit *ex parte*, and the defendent at or before such hearing appears and assigns good cause for *his previous non appearance he may, upon such* terms as the Court directs as to cost or otherwise be heard in answer to the suit as if he had appeared on the day fixed for his appearance

Sec 102

Procedure where defendant only appears

8 Where the defendant appears and the plaintiff does not appear when the suit is called on *for hearing the Court* shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof,

*

which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss suit so far as it relates to the remainder

9 (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit Sec 103

Decree against plaintiff by default bars suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party

10 Where there are more plaintiffs than one, and one or more of them appear and the others do not appear, the Court may at the instance of the plaintiff or plaintiffs appearing permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit Sec 105.

Procedure in case of non attendance of one or more of several plaintiffs

11 Where there are more defendants than one and one or more of them appear and the others do not appear, the suit shall proceed and the Court shall, at the time of pronouncing judgment make such order as it thinks fit with respect to the defendants who do not appear Sec 106.

Procedure in case of non attendance of one or more of several defendants

12 Where a plaintiff or defendant who has been ordered to appear Sec 107.

Consequence of non attendance without sufficient cause shown of party ordered to appear in person

dants, respectively, who do not appear

Setting aside Decrees ex parte

13 In any case in which a decree is passed *ex parte* against a defendant he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit Sec 108

Setting aside decree ex parte against defendant

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also

14 No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party Sec 109

No decree to be set aside without notice to opposite party

ORDER X

Examination of Parties by the Court

Sec 117

Ascertainment whether allegations in pleadings are admitted or denied

1 At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made The Court shall record such admissions and denials

Sec 118

Oral examination of party or companion of party

2 At the first hearing of the suit or at any subsequent hearing, any party appearing in person or present in Court or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied may be examined orally by the Court, *and the Court may*, if it thinks fit *put in the course of such examination* questions suggested by either party

Sec 119

Substance of examination to be written

3 The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record

Sec 120

Consequence of refusal or inability of pleader to answer

4 (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2 refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer and is likely to be able to answer if interrogated in person the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day

(2) If such party fails without lawful excuse to appear in person on the day so appointed the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit

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ORDER XI

Discovery and Inspection

Sec 121.
O 31, r 1
(E. R)

Discovery by interrogatories

1 In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories *each of such persons is required to answer Provided that no party shall* deliver more than one set of interrogatories to the same party without an order for that purpose Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross examination of a witness

O 31, r 2
(E. R)

Particular interrogatories to be submitted.

2 On an application for leave to deliver interrogatories the particular interrogatories proposed to be delivered *shall be* submitted to the Court In deciding upon such application, the Court shall take into account any

ffer, which may be made by the party sought to be interrogated to deliver articulars or to make admis
iatters in questi n or any of
f the interrogatories submitte
or disposing fairly of the su t or for saving costs

Costs of interrogatories.

3 In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories and if it is the opinion of the taxing officer or of the Court either with or without n application for inquiry that such interrogatories have been exhibited nreasonably vexatiously or at improper length the costs occasioned by e said interrogatories and the answers thereto shall be paid in any event y the party in fault — Sec 153 O 31, r 3 (E R)

Form of interrogatories

4 Interrogatories shall be in Form No 2 in Appendix C, with such variation as circumstances may require — O 31, r 4 (E R)

Corporations

5 Where any party to a suit is a corporation or a body of persons whether incorporated or not empowered by law to sue or be sued whether in its own name or in the ame of any officer or other person any opposite party may apply for n order allowing him to deliver interrogatories to any member or officer of uch corporation or body and an order may be made accordingly — Sec 124 O 31, r 5 (E R)

Objections to interrogatories by answer

6 Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide for the purpose of the suit or that the matters inquired* into are not sufficiently material at that stage or on ny other ground may be taken in the affidavit in answer — Sec 125 O 31, r 6 (E R)

Setting aside and striking out interrogatories

7 Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously or struck out on the ground that they are prolix oppressive, unnecessary or scandalous, and any application for this purpose may be made within seven days after ervice of the interrogatories — O 31, r 7 (E R)

Affidavit in answer, filing

8 Interrogatories shall be answered by affidavit to be filed within ten days or within such other time *as the Court may allow* — Sec 126 O 31, r 8 (E R)

Form of affidavit in answer

9 An affidavit in answer to interrogatories shall be in Form No 3 in Appendix C with such variations as circumstances may require — O 31, r 9 (E R)

No exceptions to be taken

10 No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be etermined by the Court — O 31, r 10 (E. R.)

Order to answer or answer further

11 Where any person interrogated omits to answer or answers insufficiently the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be And an order may be made requiring him to answer or answer further, either by affidavit r by *viva voce* examination as the Court may direct — Sec 127. O 31, r 11. (E. R.)

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4 (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2 refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer and is likely to be able to answer if interrogated in person the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day

(2) If such party fails without lawful excuse to appear in person on the day so appointed the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit

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ORDER XI

Discovery and Inspection

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O 31, r 1
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O 31, r 2
(E. R.)

Particular interrogatories to be submitted.

2 On an application for leave to deliver interrogatories the particular interrogatories proposed to be delivered shall be submitted to the Court In deciding upon such application, the Court shall take into account any

Order for inspection

18 (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than t the office of his pleader the Court may on the application of the party lesiring it make an order for inspection in such place and in such manner s it may think fit Provided that the order shall not be made when and so ar as the Court shall be of opinion that it is not necessary either for dispo ing fairly of the suit or for saving costs

Sec 133 O 31, r 18 (E R)

(2) Any application to inspect documents, except such as are referred o in the pleadings particulars or affidavits of the party against whom the pplication is made or disclosed in his affidavit of documents shall be found d upon an affidavit showing of what documents inspection is sought that he party applying is entitled to inspect them, and that they are in the poss- ssion or power of the other party The Court shall not make such order or inspection of such documents when and so far as the Court shall be of pinion that it is not necessary either for disposing fairly of the suit or for aving costs

Sec 134

Verified copies

19 (1) Where inspection of any business books is applied for, the Court may if it thinks fit, instead of ordering inspection of the original books order a copy of ny entries therein to be furnished and verified by the affidavit of some erson who has examined the copy with the original entries, and such ffidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations Provided that, notwithstanding hat such copy has been supplied the Court may order inspection of the ook from which the copy was made

O 31, r 19 A (E R)

(2) Where on an application for an order for inspection privilege is laimed for any document it shall be lawful for the Court to inspect the locument for the purpose of deciding as to the validity of the claim of rivilege

(3) The Court may, on the application of any party to a suit at any me and whether an affidavit of documents shall or shall not have already een ordered or made make an order requiring any other party to state by ffidavit whether any one or more specific documents to be specified in the pplication, is or are or has or have at any time been in his possession or ower, and if not then in his possession when he parted with the same and what has become thereof Such application shall be made on an affidavit tating that in the belief of the deponent the party against whom the applica- on is made has or has at some time had, in his possession or power the locument or documents specified in the application, and that they relate to he matters in question in the suit, or to some of them

Premature discovery

20 Where the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, the Court may, if satisfied that the right to the liscovery or inspection sought depends on the determination of any issue or uestion in dispute in the suit or that for any other reason it is desirable hat any issue or question in dispute in the suit should be determined before leciding upon the right to the discovery or inspection order that such issue r question be determined first and reserve the question as to the discovery or inspection

Sec 135 O 31, r 20

Sec 129
O 31,
r 12
(E R)

Application for discovery of documents

12 Any party may, without filing any affidavit apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein On the hearing of such application the Court may either refuse or adjourn the same if satisfied that such discovery is not necessary or not necessary at that stage of the suit or make such order either generally or limited to certain classes of documents as may, in its discretion be thought fit Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

Sec 129
(2)
O 31,
r 13
(E R)

Affidavit of documents

13 The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No 5 in Appendix C, with such variations as circumstances may require

Sec 130
O 31,
r 14

Production of documents

14 It shall be lawful for the Court, at any time during the pendency of of any suit, to order the production by any party thereto upon oath, of such of the documents in his *possession or power relating to any matter in question* in such suit as the Court shall think right, and the Court may deal with such documents when produced in such manner as shall appear just

Sec 131
O 31,
r 15
(E R)

Inspection of documents referred to in pleadings or affidavits

15 Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document to produce such document for the inspection of the party giving such notice or of his pleader, and to permit him or them to take copies thereof and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit

O 31,
r 16
(E R)

Notice to produce

16 *Notice to any party to produce any documents referred to in his* pleading or affidavits shall be in Form No 7 in Appendix C, with such variations as circumstances may require

Sec 132
O 31,
r 17
(E R)

Time for inspection when notice given

17 The party to whom such notice is given shall within ten days from the receipt of such notice deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents or such of them as he does not object to produce may be inspected at the office of his pleader, or in the case of bankers books or other books of account or books in constant use for the purposes of any trade or business at their usual place of custody, and stating which (if any) of the documents he objects to produce and on what ground Such notice shall be in Form No 8 in Appendix C, with such variations as circumstances may require

Order for inspection

18 (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection or offers inspection elsewhere than at the office of his pleader the Court may on the application of the party desiring it make an order for inspection in such place and in such manner as it may think fit Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs — Sec 133 O 31, r 18 (E R)

(2) Any application to inspect documents except such as are referred to in the pleadings particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents shall be founded upon an affidavit showing of what documents inspection is sought that the party applying is entitled to inspect them and that they are in the possession or power of the other party The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs — Sec 134

Verified copies

19 (1) Where inspection of any business books is applied for, the Court may if it thinks fit, instead of ordering inspection of the original books order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures interlineations or alterations Provided that notwithstanding that such copy has been supplied the Court may order inspection of the book from which the copy was made — O 31, r 19 A (E R)

(2) Where on an application for an order for inspection privilege is claimed for any document it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege

(3) The Court may on the application of any party to a suit at any time and whether an affidavit of documents shall or shall not have already been ordered or made make an order requiring any other party to state by affidavit whether any one or more specific documents to be specified in the application is or are or has or have at any time been in his possession or power, and if not then in his possession when he parted with the same and what has become thereof Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has or has at some time had in his possession or power the document or documents specified in the application and that they relate to the matters in question in the suit or to some of them

Premature discovery

20 Where the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof the Court may if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection order that such issue or question be determined first and reserve the question as to the discovery or inspection — Sec 135 O 31, r 20

Sec 129
O 31,
r 12
(E R)

Application for discovery of documents

12 Any party may without filing any affidavit apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein On the hearing of such application the Court may either refuse or adjourn the same if satisfied that such discovery is not necessary or not necessary at that stage of the suit, or make such order either generally or limited to certain classes of documents, as may, in its discretion be thought fit Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

Sec 129
(2)
O 31,
r 13
(E R)

Affidavit of documents

13 The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No 5 in Appendix C with such variations as circumstances may require

Sec 130
O 31,
r 14

Production of documents

14 It shall be lawful for the Court at any time during the pendency of any suit to order the production by any party thereto upon oath of such of the documents in his possession or power relating to any matter in question in such suit as the Court shall think right and the Court may deal with such documents when produced in such manner as shall appear just

Sec 131
O 31,
r 15
(E R)

Inspection of documents referred to in pleadings or affidavits

15 Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title he being a defendant to the suit or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit

O 31,
r 16
(E R)

Notice to produce

16 Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No 7 in Appendix C, with such variations as circumstances may require

Sec 132
O 31,
r 17
(E R)

Time for inspection when notice given.

17 The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground Such notice shall be in Form No 8 in Appendix C, with such variations as circumstances may require

favour of any person other than the party giving the notice Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just

Form of admissions

5 A notice to admit facts shall be in Form No 10 in Appendix C, and admissions of facts shall be in Form No 11 in Appendix C with such variations as circumstances may require — O 32, r 5 (E R)

Judgment on admissions

6 Any party may at any stage of a suit where admissions of fact have been made either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties and the Court may upon such application make such order, or give such judgment, as the Court may think just — O 32, r 6 (E R)

Affidavit of signature

7 An affidavit of the pleader or his clerk of the due signature of any admissions made in pursuance of any notice to admit documents or facts shall be sufficient evidence of such admissions if evidence thereof is required — O 32, r 7 (E R)

Notice to produce documents

8 Notice to produce documents shall be in Form No 12 in Appendix C with such variations as circumstances may require An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served — O 32, r 8 (E R)

Costs

9 If a notice to admit or produce specifies documents which are not necessary the costs occasioned thereby shall be borne by the party giving such notice — O 32, r 9 (E R)

ORDER XIII

Production Impounding and Return of Documents

Documentary evidence to be produced at first hearing

1 (1) The parties or their pleaders shall produce at the first hearing of the suit all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in Court and all documents which the Court has ordered to be produced — Secs 138, 140

(2) The Court shall receive the documents so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs

Effect of non production of documents

2 No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule I shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof, and the Court receiving any such evidence shall record the reasons for so doing — Sec 139

Sec. 140

Rejection of irrelevant or inadmissible documents

3 The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection

Sec 141

Endorsements on documents admitted in evidence

4 (1) Subject to the provisions of the next following sub rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars namely —

(*a*) the number and title of the suit,

(*b*) the name of the person producing the document,

(*c*) the date on which it was produced and

(*d*) a statement of its having been so admitted

and the endorsement shall be signed or initialled by the Judge

(2) Where a document so admitted is an entry in a book, account or record and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge

Sec 141 A

Endorsements on copies of admitted entries in books accounts and records

5 (1) Save in so far as is otherwise provided by the *Bankers' Books Evidence Act, 1891* where a document admitted in evidence in the suit is an entry in a letter-book or a shop book or other account in current use the party on whose behalf the book or account is produced may furnish a copy of the entry

(2) Where such a document is an entry in a public record produced from a public office or by a public officer or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(*a*) where the record book or account is produced on behalf of a party, then by that party or

(*b*) where the record book or account is produced in obedience to an order of the Court acting of its own motion then by either or any party

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it

Sec 142.

Endorsements on documents rejected as in[illegible]dence

6 Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (*a*), (*b*) and (*c*) of rule 4, sub-rule [illegible] with a statement of its having been [illegible] by the Judge

Sec. 142A.

Recording of admitted and return of rejected documents

[illegible] as been admitted in evidence, or a copy there[illegible] here a copy has been substituted for the original under rule 5, shall form part of the record of the suit

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them

Court may order any document to be impounded.

8 Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit Sec 14

Return of admitted documents

9. (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,— Sec 14

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless

(2) On the return of a document admitted in evidence a receipt shall be given by the person receiving it

Court may send for papers from its own records or from other Courts

10 (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same Sec 13'

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires or that the production of the original is necessary for the purposes of justice

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit

Provisions as to documents applied to material objects.

11. The provisions herein contained as to documents shall, so far as may be apply to all other material objects producible as evidence Sec 145

ORDER XIV

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon

Sec 146

Framing of issues

1. (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue

(4) Issues are of two kinds (a) issues of fact (b) issues of law

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence

Sec 146 Para 6

Issues of law and of fact

2 Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first and for that purpose may if it thinks fit postpone the settlement of the issues of fact until after the issues of law have been determined

Sec 147.

Materials from which issues may be framed

3 The Court may frame the issues from all or any of the following materials

(a) allegations made on oath by the parties or by any persons present on their behalf or made by the pleaders of such parties

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit

(c) the contents of documents produced by either party

Sec. 148

Court may examine witnesses or documents before framing issues

4 Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process

Sec 149.

Power to amend, and strike out issues

5 (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced

Questions of fact or law may by agreement be stated in form of issues

6 Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,— Sec 1

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement,

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute

Court if satisfied that agreement was executed in good faith, may pronounce judgment.

7. *Where the Court is satisfied, after making* such inquiry as it deems proper,— Sec 1

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court,

and shall, upon the finding or decision on such issue, pronounce judgment *according to the terms of the agreement*, and, upon the judgment so pronounced, a decree shall follow

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ORDER XV

Disposal of the Suit at the first hearing

Parties not at issue

1. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment Sec 15

One of several defendants not at issue

2 Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants Sec 15

Parties at issue

3 (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is Sec. 15

required upon such of the issues as may be sufficient for the decision of the suit and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues and, if the finding thereon is sufficient for the decision may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit

Provided that where the summons has been issued for the settlement of issues only the parties or their pleaders are present and none of them objects

(2) Where the finding is not sufficient for the decision the Court shall postpone the further hearing of the suit and shall fix a day for the production of such further evidence or for such further argument as the case requires

Sec 155 4 Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment or may, if it thinks fit after framing and recording issues adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues

Failure to produce evidence

ORDER XVI

Summoning and Attendance of Witnesses

Sec 159 1 At any time after the suit is instituted the parties may obtain, on application to the Court or to such officer as it appoints in this behalf summonses to persons whose attendance is required either to give evidence or to produce documents

Summons to attend to give evidence or produce documents

Sec 160 2 (1) The party applying for a summons shall before the summons is granted and within a period to be fixed pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend and for one day's attendance

Expenses of witness to be paid into Court on applying for summons

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

Experts

(3) Where the Court is subordinate to a High Court regard shall be had in fixing the scale of such expenses, to any rules made in that behalf

Scale of expenses

Sec 161 3 The sum so paid in Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally

Tender of expenses to witness

Procedure where insufficient sum paid in

4 (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account and in case of default in payment may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons, or the Court may discharge the person summoned without requiring him to give evidence or may both order such levy and discharge such person as aforesaid Sec 16

Expenses of witnesses detained more than one day

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may from time to time order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and in default of such deposit being made may order such sum to be levied by attachment and sale of the moveable property of such party or the Court may discharge the person summoned without requiring him to give evidence or may both order such levy and discharge such person as aforesaid

Time place and purpose of attendance to be specified in summons

5 Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes and any particular document which the person summoned is called on to produce shall be described in the summons with reasonable accuracy Sec 16

Summons to produce document

6 Any person may be summoned to produce a document without being summoned to give evidence, and any person summoned merely deemed to have causes such document to be produced produce the same Sec 16

Power to require persons present in Court to give evidence or produce document

7 Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power Sec 16

Summons how served

8 Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule Sec 16

Time for serving summons

9 Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required Sec 16

Procedure where witness fails to comply with summons

10 (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons the Court shall, if the certificate of the serving officer has not been Sec 16

required upon such of the issues as may be sufficient for the decision of the suit and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues and, if the finding thereon is sufficient for the decision may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit

Provided that where the summons has been issued for the settlement of issues only the parties or their pleaders are present and none of them objects

(2) Where the finding is not sufficient for the decision the Court shall postpone the further hearing of the suit and shall fix a day for the production of such further evidence or for such further argument as the case requires

Sec 155 — Failure to produce evidence

4 Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment or may, if it thinks fit after framing and recording issues adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues

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ORDER XVI

Summoning and Attendance of Witnesses

Sec 159 — Summons to attend to give evidence or produce documents

1 At any time after the suit is instituted the parties may obtain, on application to the Court or to such officer as it appoints in this behalf summonses to persons whose attendance is required either to give evidence or to produce documents

Sec 160 — Expenses of witness to be paid into Court on applying for summons

2 (1) The party applying for a summons shall before the summons is granted and within a period to be fixed pay into Court such a sum of money as appears to the Court to be sufficient to defray the *travelling and other* expenses of the person summoned in passing to and from the Court in which he is required to attend and for one day's attendance

Experts

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

Scale of expenses

(3) Where the Court is subordinate to a High Court regard shall be had in fixing the scale of such expenses, to any rules made in that behalf

Sec 161 — Tender of expenses to witness

3 The sum so paid in Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally

Court may, of its own motion, cause such person to be summoned as a witness to give evidence or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document

Duty of persons summoned to give evidence or produce document

15 Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced at such time and place Sec 172

When they may depart

16 (1) A person so summoned and attending shall, unless the Court otherwise directs attend at each hearing until the suit has been disposed of Sec 173

(2) On the application of either party and the payment through the Court of all necessary expenses (if any) the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and in default of his furnishing such security, may order him to be detained in the civil prison

Application of rules 10 to 13

17 The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16 Secs 174, 175, Para 1

Procedure where witness apprehended cannot give evidence or [illegible]

18 Where any person arrested under a warrant is brought before the Court in custody and cannot owing to the absence of the parties or any of them give the evidence or produce the document which he has been summoned to [illegible] quire him to give [illegible] uch time and place [illegible] may release him, [illegible] order him to be detained in the civil prison Sec 174

No witness to be ordered to attend in person unless resident within certain limits

19 No one shall be ordered to attend in person to give evidence unless he resides— Sec 176

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court house

Consequence of refusal of party to give evidence when called on by Court

20 Where any party to a suit present in Court refuses without lawful excuse when required by the Court to give evidence or to produce any document then and there in his possession or power the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit Sec 177.

Sec. 178

Rules as to witnesses to apply to parties summoned

21 Where any party to a suit is required to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as they are applicable

ORDER XVII

Adjournments

Sec 156

Court may grant time and adjourn hearing

1. (1) The Court may if sufficient cause is shown at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit

Costs of adjournment

(2) In every such case the Court shall fix a day for the further hearing of the suit and may make such order as it thinks fit with respect to the costs occasioned by the adjournment

Provided that when the hearing of evidence has once begun the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded

Sec 157

Procedure if parties fail to appear on day fixed

2. Where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit

Sec. 158

Court may proceed notwithstanding either party fails to produce evidence etc

3 Where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit, for which time has been allowed the Court may notwithstanding such default proceed to decide the suit forthwith

ORDER XVIII

Hearing of the Suit and Examination of Witnesses

Sec 179, Expl.

Right to begin

1 The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks in which case the defendant has the right to begin

Sec 179

Statement and production of evidence

2 (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove

Sec 180

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case

(3) The party beginning may then reply gen[illegible]

3 Where there are several issues, the burden of [illegible] which lies on the other party, [illegible] may at his option either pro[illegible] those issues or reserve [illegible] by [illegible] evidence produced by the other party and in the [illegible] beginning may produce evidence on those issues after [illegible] produced all his evidence and the other party may then [illegible] the evidence so produced by the party beginning, but the [illegible] will then be entitled to reply generally on the whole case

Evidence where several issues

4 The evidence of the witnesses in attendance shall [illegible] in open Court in the presence [illegible] personal direction and superintendence of [illegible]

Witnesses to be examined in open Court

5 *In cases in which an appeal is allowed the [illegible]* witness shall be taken down in w[illegible] language of the Court by or in the [illegible] *under the personal direction and s[illegible]* of the Judge not ordinarily in the form of [illegible] and answer but in that of a narrative and when completed [illegible] *over in the presence of the Judge and of the witness, and the Judge* [illegible] if necessary correct the same and shall sign it

How evidence shall be taken in appealable cases

6 Where the evidence is taken down in a langua[illegible] that in which it is given and the witness [illegible] understand the language in which it is taken [illegible] the evidence as taken down in writing shall be in[illegible]terpreted to him in the language in which it is given

When deposition to be interpreted

7 Evidence taken down under section 138 shall be in the [illegible] prescribed by rule 5 and shall be read [illegible] signed and as occasion may require interpreted and corrected as if it were evidence taken down under that rule

Evidence under section 138

8 Where the evidence is not taken down in writing by the Judge, he shall be bound as the examination of each [illegible] proceeds to make a memorandum of the substance of what each witness deposes and such memorandum shall be written and signed by the Judge and shall form part of the record

Memorandum when evidence not taken down by Judge

9 Where English is not the language of the Court but all the parties to the suit who appear in person and the pleaders *of such as appear by pleaders do not object* to [illegible] such evidence as is given in English taken down in English the Judge may so take it down

When evidence may be taken in English

10 The Court may of its own motion or on the application of any party or his pleader take down any particular question and answer or any objection to any question if there appears to be any special reason for so doing

Any particular question *and answer may be* taken down

11 Where any question put to a witness is objected to by a party or his pleader and the Court allows the same to be put the Judge shall take down the question the answer the objection and the name of the person making it, together with the decision of the Court thereon

Questions objected to and allowed by Court

Sec 204 5 In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit

Court to state its decision on each issue

Secs 206 221 6 (1) The decree shall agree with the judgment it shall contain the number of the suit the names and descriptions of the parties and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit

Contents of decree

(2) The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter

Sec 205 7 The decree shall bear date the day on which the judgment was pronounced and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree

Date of decree

New 8 Where a Judge has vacated office after pronouncing judgment but without signing the decree a decree drawn up in accordance with such judgment may be signed by his successor or if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate

Procedure where Judge has vacated office before signing decree

Sec 207 9 Where the subject matter of the suit is immoveable property, the decree shall contain a description of such property, sufficient to indentify the same and where such property can be indentified by boundaries or by numbers in a record of settlement or survey the decree shall specify such boundaries or numbers

Decree for recovery of immoveable property

Sec 208 10 Where the suit is for moveable property and the decree is for the delivery of such property the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had

Decree for delivery of moveable property

Sec 210 11 (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable

Decree may direct payment by instalments

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree holder order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor, or the taking of security from him, or otherwise, as it thinks fit

Order after decree for payment by instalments

12. (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree— Secs 211, 212

Decree for possession and mesne profits

(a) for the possession of the property,

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits,

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree holder,

(ii the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court, or

(iii) the expiration of three years from the date of the decree

whichever event first occurs

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry

13 (1) Where a suit is for an account of any property and for its due administration under the decree of the Court the Court shall before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made and giving such other directions as it thinks fit Sec 213

Decree in administration suit

(2) In the administration by the Court of the property of any deceased person if such property proves to be insufficient for the payment in full of his debts and liabilities the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree and make such claims against the same as they may respectively be entitled to by virtue of *this Code*

14 (1) Where the Court decrees a claim to pre emption in respect of a particular sale of property and the purchase-money has not been paid into Court the decree shall— Sec 214

Decree in pre emption suit

(a) specify a day on or before which the purchase money shall be so paid, and

(b) direct that on payment into Court of such purchase money, together with the costs (if any) decreed against the plaintiff, on *or before the day referred to in clause (a), the defendant shall* deliver possession of the property to the plaintiff whose title thereto shall be deemed to have accrued from the date of such payment but that if the purchase money and the costs (if any) are not so paid the suit shall be dismissed with costs

(2) *Where the Court has adjudicated upon rival claims to pre emption,* the decree shall direct,—

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre emptor complying with the provisions of sub rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre emptor failing to comply with the said provisions would but for such default, have taken effect, and

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre emptor shall not take effect unless and until the superior pre emptor has failed to comply with the said provisions

Sec 215

Decree in suit for dissolution of partnership

15 Where a suit is for the dissolution of a partnership, or the *taking* of partnership accounts the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken, and other acts to be done, as it thinks fit

Sec 215 A

Decree in suit for account between principal and agent

16 In a suit for an account of pecuniary transaction between a principal and an agent and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party that an account should be taken, the Court shall before passing its final decree pass a preliminary decree directing such accounts to be taken as it thinks fit

New

Special directions as to account

17 The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised

New

Decree in suit for partition of property or separate possession of a share therein

18 Where the Court passes a decree for the partition of property or for the separate possession *of a share therein, then,*—

(1) if and in so far as the decree relates to an estate assessed to the *payment of revenue to the Government, the decree shall declare the rights* of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector or any gazetted subordinate *of the Collector* deputed by him in this behalf, in *accordance* with such declaration and with the provisions of section 54,

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required

19 (1) Where defendant has been allowed a set off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party Sec. 216.

Decree when set off is allowed

(2) Any decree passed in a suit in which a set off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed

Appeal from decree relating to set off

(3) The provisions of this rule shall apply whether the set off is admissible under rule 6 of Order VIII or otherwise

Certified copies of judgment and decree to be furnished

20 Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense Sec 217

ORDER XXI

Execution of Decrees and Orders

Payment under Decree

Modes of paying money under decree

1 (1) All money payable under a decree shall be paid as follows, namely — Sec 257.

(a) into the Court whose duty it is to execute the decree, or

(b) out of Court to the decree holder, or

(c) otherwise as the Court which made the decree directs

(2) Where any payment is made under clause (a) of sub rule (1) notice of such payment shall be given to the decree holder

2 (1) Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree holder the decree holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly Sec 258

Payment out of Court to decree holder

(2) The judgment debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree holder to show cause on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified and if, after service of such notice, the decree holder fails to show cause why the payment or adjustment should not be recorded as certified the Court shall record the same accordingly

(3) A payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by the Court executing the decree

Courts executing Decrees

3 Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure New

Lands situate in more than one jurisdiction

Sec 223 Para 5 — Transfer to Court of Small Causes

4 Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which as regards its subject matter, is *not excepted by the law for the time being in force* from the cognizance of either a Presidency or a Provincial Court of Small Causes and the Court which passed it wishes it *to be executed in Calcutta*, Madras Bombay or Rangoon such Court may send to the Court of Small Causes in Calcutta Madras Bombay or Rangoon as the case may be, the copies and certificates mentioned in rule 6 and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

Sec 223, Para 6 — Mode of transfer

5 Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree such Court shall send the same directly to the former Court But where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed

Sec 224 — Procedure where Court desires that its own decree shall be executed by another Court

6 The Court sending a decree for execution shall send—

(*a*) a copy of the decree,

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed or, where the decree has been executed in part the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied, and

(*c*) *a copy of any order for the execution of the decree, or, if no such* order has been made, a certificate to that effect

Sec 225 — *Court receiving copies* of decree etc to file same without proof

7 The Court to which a decree is so sent shall cause such copies and certificates to be filed without any further proof of the decree or order for execution, or of the copies thereof unless the Court for any special reasons to be recorded under the hand of the Judge, requires such proof

Sec 226 — Execution of decree or order by Court to which it is sent

8 Where such copies are so filed the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction

Sec 227 — Execution by High Court of decree transferred by other Court

9 *Where the Court to which the decree is sent for execution is a High* Court the decree shall be executed by such Court in *the same manner as if it had been passed by such* Court in the exercise of its ordinary original civil jurisdiction

Application for execution

Sec 230 Para 1 — Application for execution

10 Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof

11 (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment debtor, prior to the preparation of a warrant if he is within the precincts of the Court Sec 256

Oral application.

(2) Save as otherwise provided by sub rule (1) every application for the execution of a decree shall be in writing signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:— Sec 235

Written application

(*a*) the number of the suit,

(*b*) the names of the parties,

(*c*) the date of the decree,

(*d*) whether any appeal has been preferred from the decree,

(*e*) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree,

(*f*) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results,

(*g*) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed,

(*h*) the amount of the costs (if any) awarded,

(*i*) the name of the person against whom execution of the decree is sought, and

(*j*) the mode in which the assistance of the Court is required, whether—

(*i*) by the delivery of any property specially decreed,

(*ii*) by the attachment and sale or by the sale without attachment, of any property,

(*iii*) by the arrest and detention in prison of any person,

(*iv*) by the appointment of a receiver,

(*v*) *otherwise, as the nature of the relief granted may require*

(3) The Court to which an application is made under sub rule (2) may require the applicant to produce a certified copy of the decree

12 Where an application is made for the attachment of any moveable property belonging to a judgment debtor but not in his possession the decree holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same Sec 236

Application for attachment of moveable property not in judgment debtor's possession

13 Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot— Sec 237

Application for attachment of immoveable property to contain certain particulars

(*a*) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers, and

(*b*) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same

Sec 238

Power to require certified extract from Collector's register in certain cases

14 Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue or as liable to pay revenue for the land and the shares of the registered proprietors

Sec 231

Application for execution by joint decree holder

15 (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may unless the decree imposes any condition to the contrary apply for the execution of the whole decree for the benefit of them all or where any of them has died, for the benefit of the survivors and the legal representatives of the deceased

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application

Sec 232

Application for execution by transferee of decree

16 Where a decree or if a decree has been passed jointly in favour of two or more persons the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law the transferee may apply for execution of the decree to the Court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree holder

Provided that where the decree or such interest as aforesaid, has been transferred by assignment notice of such application shall be given to the transferor and the judgment debtor and the decree shall not be executed until the Court has heard their objections (if any) to its execution

Provided also that where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the other

Sec 245

Procedure on receiving application for execution of decree

17 (1) On receiving an application for the execution of a decree as provided by rule 11 sub rule (2) the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with and if they have not been complied with the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it

(2) Where an application is amended under the provisions of sub rule (1) it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented

(3) Every amendment made under this rule shall be signed or initialled by the Judge

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application

Provided that in the case of a decree for the payment of money, the value of the property attached shall as nearly as may be, correspond with the amount due under the decree

Execution in case of cross decrees

18 (1) Where applications are made to a Court for the execution of cross decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court then— Sec 246.

(a) if the two sums are equal satisfaction shall be entered upon both decrees, and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment debts due by the original assignor as in respect of judgment debts due by the assignee himself

(3) This rule shall not be deemed to apply unless—

(a) the decree holder in one of the suits in which the decrees have been made is the judgment debtor in the other and each party fills the same character in both suits and

(b) the sums due under the decrees are definite

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross decree in relation to a decree passed against him singly in favour of one of more or such persons

Illustrations

(a) A holds a decree against B for Rs 1 000 B holds a decree against A for the payment of Rs 1 000 in case A fails to deliver certain goods at a future day B cannot treat his decree as a cross decree under this rule

(b) A and B co plaintiffs obtain a decree for Rs 1 000 against C and C obtains a decree for Rs 1,000 against B C cannot treat his decree as a cross decree under this rule

(c) A obtains a decree against B for Rs 1 000 C who is a trustee for B obtains a decree on behalf of B against A for Rs 1 000 B cannot treat C s decree as a cross decree under this rule

(d) A B C D and L are jointly and severally liable for Rs 1 000 under a decree obtained by F A obtains a decree for Rs 100 against F singly and applies for execution to the Court in which the joint decree is being executed F may treat his joint decree as a cross decree under this rule

Execution in case of cross claims under same decree

19 Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,— Sec 247

(a) if the two sums are equal satisfaction for both upon the decree and

(*b*) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree

New — Cross decrees and cross claims in mortgage suits

20 The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge

Sec 230 Para 2 — Simultaneous execution

21 The Court may in its discretion, refuse execution at the same time against the person and property of the judgment debtor

Sec 248 — Notice to show cause against execution in certain cases

22 (1) Where an application for execution is made

(*a*) more than one year after the date of the decree, or

(*b*) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed why the decree should not be executed against him

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within *one* year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him

(2) Nothing in the foregoing sub rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if for reasons to be recorded, it considers thatt he issue of such notice would cause unreasonable delay or would defeat the ends of justice

Sec 248 — Procedure after issue of notice

23 (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not the executed, the Court shall order the decree to be executed

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit

Process for execution

Sec 250 — Process for execution

24 (1) When the preliminary measures (if any) required by the fore going rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed

(3) In every such process a day shall be specified on or before which it shall be executed

Endorsement on process

25 (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner, in which it was executed, and if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court Secs 343, 251

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result

Stay of execution

When Court may stay execution

26 (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the Court by which the decree was passed or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby or if application for execution had been made thereto Sec 239

(2) Where the property or person of the judgment debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application

Power to require security from or impose conditions upon, judgment debtor

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor the Court may require such security from, or impose such conditions upon the judgment-debtor as it thinks fit Sec 240

Liability of judgment debtor discharged

27 No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment debtor from being re taken in execution of the decree sent for execution Sec 241

Order of Court which passed decree or of appellate Court to be binding upon Court applied to

28 Any order of the Cour by which the decree was passed, or of such Court of appeal as aforesaid in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution Sec 242

Stay of execution pending suit between decree holder and judgment debtor

29 Where a suit is pending in any Court against the holder of a decree of such Court on the part of the person against whom the decree was passed the Court may on such terms as to security or otherwise, as it thinks fit stay execution of the decree until the pending suit has been decided Sec 243

Mode of execution

Sec 254 30 Every decree for the payment of money including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment debtor or by the attachment and sale of his property or by both

Decree for payment of money

Sec. 259 31 (1) Where the decree is for any specific moveable, or for any share in a specific moveable it may be executed by the seizure if practicable of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged or to such person as he appoints to receive delivery on his behalf or by the detention in the civil prison of the judgment debtor, or by the attachment of his property or by both

Decree for specific moveable property

(2) Where any attachment under sub rule (1) has remained in force for six months if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold such property may be sold and out of the proceeds the Court may award to the decree-holder in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property such amount, and in other cases such compensation as it thinks fit and shall pay the balance (if any) to the judgment debtor on his application

(3) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment no application to have the property sold has been made or if made has been refused, the attachment shall cease

Sec 260 32 (1) Where the party against whom a decree for the specific performance of a contract or for restitution of conjugal rights or for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it the decree may be enforced by his detention in the civil prison or by the attachment of his property, or by both

Decree for specific performance for restitution of conjugal rights or for an injunction

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation the decree may be enforced by the attachment of the property of the corporation or with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof or by both attachment and detention

(3) Where any attachment under sub rule (1) or sub rule (2) has remained in force for one year if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold such property may be sold, and out of the proceeds the Court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to

all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder or some other person appointed by the Court at the cost of the judgment debtor, and upon the fac being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree

Illustration

A a person of little substance erects a building which renders uninhabitable a [illegible] d the attach [illegible] B and direct [illegible] il zable by the [illegible] in the value of his mansion B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings

33 (1) Notwithstanding anything in rule 32 the Court either at the time of passing a decree for the restitution of conjugal rights or at any time afterwards may order that the decree shall not be executed by detention in prison New

Discretion of Court in executing decrees for restitution of conjugal rights

(2) Where the Court has made an order under sub rule (1) and the decree holder is the wife it may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment debtor shall make to the decree holder such periodical payments as may be just and if it thinks fit require that the judgment debtor shall to its satisfaction secure to the decree holder such periodical payments

(3) The Court may from time to time vary or modify any order made under sub rule (2) for the periodical payment of money either by altering the times of payment or by increasing or diminishing the amount or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid and again revive the same either wholly or in part as it may think just

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money

34. (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment debtor neglects or refuses to obey the decree the decree holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court Secs 261, 262

Decree for execution of document or endorsement of negotiable instrument

(2) The Court shall thereupon cause the draft to be served on the judgment debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf

(3) Where the judgment debtor objects to the draft his objections shall be stated in writing within such time and the Court shall make such order approving or altering the draft as it thinks fit

(4) The decree holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the New

Mode of execution

Sec 254

Decree for payment of money

30 Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property, or by both.

Sec 259

Decree for specific moveable property

31 (1) Where the decree is for any specific moveable, or for any share in a specific moveable it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged or to such person as he appoints to receive delivery on his behalf or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both

(2) Where any attachment under sub rule (1) has remained in force for six months if the judgment debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold such property may be sold and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application

(3) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment no application to have the property sold has been made or, if made has been refused, the attachment shall cease

Sec 260

Decree for specific performance, for restitution of conjugal rights or for an injunction

32 (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it the decree may be enforced by his detention in the civil prison or by the attachment of his property, or by both

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub rule (1) or sub rule (2) has remained in force for one year, if the judgment debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and out of the proceeds the Court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor

38. Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid **Sec 337.**

Warrant for arrest to direct judgment debtor to be brought up

39 (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment debtor from the time of his arrest until he can be brought before the Court **Sec 339**

Subsistence allowance

(2) Where a judgment debtor is committed to the civil prison in execution of a decree the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment debtor has been arrested by monthly payments in advance before the first day of each month

) The first payment shall be made to the proper officer of the Court h portion of the current month as remains unexpired before the ent debtor is committed to the civil prison, and the subsequent pay- (if any) shall be made to the officer in charge of the civil prison

(5) Sums disbursed by the decree holder for the subsistence of the nent-debtor in the civil prison shall be deemed to be costs in the **Sec 340**

rovided that the judgment debtor shall not be detained in the civil n or arrested on account of any sum so disbursed

40 (1) Where a judgment debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is un- from poverty or other sufficient cause to pay the amount of the decree that amount is payable by instalments the amount of any instalment eof, the Court may upon such terms (if any) as it thinks fit, make an n er disallowing the application for his arrest and detention, or directing is release, as the case may be **Sec 337A**

oceedings on ap nce of judgment r in obedience to e or after arrest

(2) Before making an order under sub rule (1), the Court may take into consideration any allegation of the decree holder touching any of the following matters namely —

(a) the decree being for a sum for which the judgment- bound in any fiduciary capacity to account,

(b) the transfer concealment or removal by the any part of his property after the date of the suit in which the decree was passed, or the after that date of any other act of bad faith

proper stamp paper if a stamp is required by the law for the time being in force and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered

Sec 262 (5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form namely —

C D Judge of the Court of
(or as the case may be) for A B in a suit by E F against A B',
and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same

(6) The Court or such officer as it may appoint in this behalf shall cause the document to be registered if its registration is required by the law for the time being in force or the decree holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses, of the registration

Sec 263 35 (1) Where a decree is for the delivery of any immoveable property possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf and if necessary by removing any person bound by the decree who refuses to vacate the property

Decree for immoveable property

New. (2) Where a decree is for the joint possession of immoveable property such possession shall be delivered by affixing a copy of the warr[illegible], at the conspicuous place on the property and proclaiming by beat [illegible] to have other customary mode at some convenient place, the subst[illegible] ttach decree

New (3) Where possession of any building or enclosure is to be [illegible] and the person in possession being bound by the decree does [illegible] free access the Court through its officers may, after giving [illegible] warning and facility to any woman not appearing in public acco[illegible] customs of the country to withdraw, remove or open any lock [illegible] break open any door or do any other act necessary for putting th[illegible] holder in possession

Sec 264 36 Where a decree is for the delivery of any immoveabl[illegible] in the occupancy of a tenant or other per[illegible] to occupy the same and not bound by the[illegible] relinquish such occupancy, the Court [illegible] delivery to be made by affixing a copy of [illegible] in some conspicuous place on the property, and proclaiming to the[illegible] by beat of drum or other customary mode at some convenient [illegible] substance of the decree in regard to the property

Decree for delivery of immoveable property when in occupancy of tenant

Arrest and detention in the civil prison

Sec 245B 37. (1) Notwithstanding anything in these rules where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application the Court may, instead of issuing a warrant for his arrest issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison

Discretionary power to permit judgment debtor to show cause against detention in prison

(2) Where appearance is not made in obedience to the notice, the Court shall if the decree holder so requires issue a warrant for the arrest of the judgment debtor

38. Every warrant for the arrest of a judgment debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable be sooner paid Sec 337

Warrant for arrest to direct judgment debtor to be brought up

39 (1) No judgment debtor shall be arrested in execution of a decree unless and until the decree holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment debtor from the time of his arrest until he can be brought before the Court Sec 339

Subsistence allowance

(2) Where a judgment debtor is committed to the civil prison in execution of a decree the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or where no such scales have been fixed as it considers sufficient with reference to the class to which he belongs

(3) The monthly allowance fixed by the Court shall be supplied by [illegible]e party on whose application the judgment debtor has been arrested by [illegible]onthly payments in advance before the first day of each month

[illegible] The first payment shall be made to the proper officer of the Court [illegible]h portion of the current month as remains unexpired before the [illegible]ent debtor is committed to the civil prison and the subsequent pay[illegible] (if any) shall be made to the officer in charge of the civil prison

[illegible]5) Sums disbursed by the decree holder for the subsistence of the [illegible]ent-debtor in the civil prison shall be deemed to be costs in the [illegible] Sec 340

[illegible]rovided that the judgment debtor shall not be detained in the civil [illegible] or arrested on account of any sum so disbursed

40 (1) Where a judgment debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment debtor is un[illegible] from poverty or other sufficient cause to pay the amount of the decree [illegible] that amount is payable by instalments the amount of any instalment [illegible] of the Court may upon such terms (if any) as it thinks fit make an [illegible]der disallowing the application for his arrest and detention or d[illegible] [illegible]is release as the case may be Sec 337A

[illegible]ceedings on ap[illegible]nce of judgment [illegible] in obedience to [illegible] or after arrest

(2) Before making an order under sub rule (1), the Court may [illegible] [illegible]onsideration any allegation of the decree holder touching any [illegible] [illegible]ng matters namely —

(*a*) the decree being for a sum for which the ju[illegible] bound in any fiduciary capacity to account,

(*b*) the transfer concealment or removal by the j[illegible] any part of his property after the date of [illegible] suit in which the decree was passed or [illegible] after that date of any other act of bad fa[illegible]

property, with the object or effect of obstructing or delaying the decree holder in the execution of the decree

(*c*) any undue preference given by the judgment debtor to any of his other creditors

(*d*) refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has or since the date of the decree has had the means of paying it,

(*e*) the likelihood of the judgment debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree holder in the execution of the decree

(3) While any of the matters mentioned in sub rule (*2*) are being considered the Court may in its discretion order the judgment debtor to be detained in the civil prison or leave him in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required by the Court

(4) A judgment debtor released under this rule may be re arrested

(5) Where the Court does not make an order under sub rule (*1*) it shall cause the judgment debtor to be arrested if he has not already been arrested and subject to the other provisions of this Code commit him to the civil prison

Attachment of property

Sec 267 — Examination of judgment debtor as to his property

41 Where a decree is for the payment of money the decree holder may apply to the Court for an order that—

(*a*) the judgment debtor or

(*b*) in the case of a corporation any officer thereof or

(*c*) any other person

be orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any and what other property or means of satisfying the decree and the Court may make an order for the attendance and examination of such judgment debtor, or officer or other person and for the production of any books or documents

Sec 225 — Attachment in case of decree for rent or mesne profits or other matter amount of which to be subsequently determined

42 Where a decree directs an inquiry as to rent or mesne profits or any other matter the property of the judgment debtor may before the amount due from him has been ascertained be attached as in the case of an ordinary decree for the payment of money

Sec 269 — Attachment of moveable property other than agricultural produce in possession of judgment debtor

43. Where the property to be attached is moveable property other than agricultural produce in the possession of the judgment debtor the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof

Provided that when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once

Attachment of agricultural produce

44 Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment— New.

(*a*) where such produce is a growing crop, on the land on which such crop has grown, or

(*b*) where such produce has been cut or gathered, *on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,*

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or with the leave of the Court, *on the outer door or on some other conspicuous part of* the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain, and the produce shall thereupon be deemed to have passed into the possession of the Court

Provisions as to agricultural produce under attachment

45. (*1*) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify *the time at which it is likely to be fit to be cut or gathered* New.

(*2*) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it, and if the judgment-*debtor fails to do all or any of such acts the decree holder may*, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree holder shall be recoverable from the judgment debtor as if they were included in, or formed part of, the decree

(*3*) Agricultural produce attached as a growing crop shall *not be deemed* to have ceased to be under attachment or to require re attachment merely because it has been severed from the soil

(*4*) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered the Court may suspend the execution of the order for such time as it thinks fit and may, in its discretion make a further order prohibiting the removal of the crop pending the execution of the order of attachment

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered

Attachment of debt, share and other property not in possession of judgment debtor

46 (*1*) In the case of— Sec 268.

(*a*) a debt not secured by a *negotiable instrument*

(*b*) a share in the capital of a corporation,

(*c*) other moveable property not in the possession of the judgment-debtor except property deposited in or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the court-house, and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

New

Attachment of share in moveables.

47. Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

New

Attachment of salary or allowances of public officer or servant of railway company or local authority.

48. (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits, if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

49 (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such New

Attachment of partnership property

(2) The Court may on the application of the holder of a decree against a partner make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree and may by the same or a subsequent order appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree holder by such partner or as the circumstances of the case may require

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or in the case of a sale being directed, to purchase the same

(4) Every application for an order under sub rule (2) shall be served on the judgment debtor and on his partners or such of them as are within British India O 46, r 1A (E R)

(5) Every application made by any partner of the judgment debtor under sub rule (3) shall be served on the decree holder and on the judgment debtor and on such of the other partners as do not join in the application and as are within British India O 46, r 1B (E R)

(6) Service under sub rule (4) or sub rule (5) shall be deemed to be service on all the partners and all orders made on such applications shall be similarly served

Execution of decree against firm

50 (1) Where a decree has been passed against a firm execution may be granted— O 48 A, r 8 (E R)

(a) against any property of the partnership

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is or who has been adjudged to be, a partner

(c) against any person who has been individually served as a partner with a summons and has failed to appear

Provided that nothing in this sub rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act IX of 1872

(2) Where the decree holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub rule (1) clauses (b) and (c) as being a partner in the firm he may apply to the Court which passed the decree for leave and where the liability is not disputed such Court may grant such leave or where such liability is disputed may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined

(3) Where the liability of any person has been tried and determined under sub rule (2) the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer

Sec 270. **51** Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court

Attachment of negotiable instruments

Sec. 272. **52** Where the property to be attached is in the custody of any Court or public officer the attachment shall be made by a notice to such Court or officer, requesting that such property and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued

Attachment of property in custody of Court or public officer

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree holder and any other person, not being the judgment debtor, claiming to be interested in such property by virtue of any assignment attachment or otherwise, shall be determined by such Court

Sec 273 **53.** (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

Attachment of decrees

(*a*) if the decrees were passed by the same Court, then by order of such Court, and,

(*b*) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed requesting such other Court to stay the execution of its decree unless and until—

(*i*) the Court which passed the decree sought to be executed cancels the notice, or

(*ii*) the holder of the decree sought to be executed or his judgment debtor applies to the Court receiving such notice to execute its own decree

(2) Where a Court makes an order under clause (*a*) of sub rule (*1*), or receives an application under sub head (*ii*) of clause (*b*) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub rule (*1*) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub rule (*1*), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way, and,

where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached, and no payment or adjustment of the attached decree made by the judgment debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise shall be recognised by any Court so long as the attachment remains in force

Attachment of immoveable property

54. (1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge Sec 274.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court house and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate

Removal of attachment after satisfaction of decree

55. Where— Sec 275.

(*a*) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(*b*) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(*c*) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and in the case of immovable property, the withdrawal shall if the judgment debtor so desires be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

Order for payment of coin or currency notes to party entitled under decree

56. Where the property attached is current coin or currency notes the Court may, at any time during the continuance of the attachment direct that such coin or notes or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same Sec 277.

Determination of attachment

57. Where any property has been attached in execution of a decree but by reason of the decree holder's default the Court is unable to proceed further with the application for execution it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date Upon the dismissal of such application the attachment shall cease New.

Investigation of claims and objections

Sec 278

Investigation of claims to and objections to attachment of attached property

58 (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects as if he was a party to the suit

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed

Postponement of sale

(2) Where the property to which the claim or objection applies has been advertised for sale the Court ordering the sale may postpone it pending the investigation of the claim or objection

Sec 279

Evidence to be adduced by claimant

59. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in or was possessed of, the property attached

Sec 280

Release of property from attachment

60. Whereupon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not when attached, in the possession of the judgment debtor or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him or that being in the possession of the judgment debtor at such time, it was so in his possession not on his own account or as his own property but on account of or in trust for some other person, or partly on his own account and partly on account of some other person the Court shall make an order releasing the property wholly or to such extent as it thinks fit, from attachment

Sec 281

Disallowance of claim to property attached

61 Where the Court is satisfied that the property was at the time it was attached in the possession of the judgment debtor as his own property and not on account of any other person or was in the possession of some other person in trust for him or in the occupacy of a tenant or other person paying rent to him the Court shall disallow the claim

Sec. 282.

Continuance of attachment subject to claim of incumbrancer

62 Where the Court is satisfied that the property is subject to a mortgage or charge in favor of some person not in possession and thinks fit to continue the attachment it may do so subject to such mortgage or charge

Sec. 283

Saving of suits to establish right to attached property

63 Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute but subject to the result of such suit if any, the order shall be conclusive

Sale generally.

64 Any Court executing a decree may order that any property attached by it and liable to sale or such portion thereof as may seem necessary to satisfy the decree shall be sold and that the proceeds of such sale or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same Sec 284

Power to order property attached to be sold and proceeds to be paid to person entitled

65 Save as otherwise prescribed every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed Sec 286

Sales by whom conducted and how made

66 (1) Where any property is ordered to be sold by public auction in execution of a decree the Court shall cause a proclamation of the intended sale to be made in the language of such Court Sec 287

Proclamation of sales by public auction

(2) Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(*a*) the property to be sold,

(*b*) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government,

(*c*) any incumbrance to which the property is liable,

(*d*) the amount for the recovery of which the sale is ordered, and

(*e*) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing so far as they are known to or can be ascertained by the person making the verification the matters required by sub rule (2) to be specified in the proclamation Sec 287 last para

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto

67 (1) Every proclamation shall be made and published, as nearly as may be in the manner prescribed by rule 54 sub rule (2) Sec 289

Mode of making proclamation

(2) Where the Court so directs such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot in the opinion of the Court, otherwise be given

Sec 290 68. Save in the case of property of the kind described in the proviso to rule 43 no sale hereunder shall without the consent in writing of the judgment debtor, take place until after the expiration of at least thirty days in the case of immoveable property and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court house of the Judge ordering the sale

Time of sale

Sec 291 69. (1) The Court may in its discretion, adjourn any sale hereunder to a specified day and hour and the officer conducting any such sale may in his discretion adjourn the sale recording his reasons for such adjournment

Adjournment or stoppage of sale

Provided that where the sale is made in or within the precincts of the court house no such adjournment shall be made without the leave of the Court

(2) Where a sale is adjourned under sub rule (1) for a longer period than seven days a fresh proclamation under rule 67 shall be made, unless the judgment debtor consents to waive it

(3) Every sale shall be stopped if before the lot is knocked down the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale

Sec 287, last para 70 Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector

Saving of certain sales

Sec 293 71. Any deficiency of price which may happen on a re sale by reason of the purchaser s default and all expenses attending such re sale shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be by the officer or other person holding the sale and shall, at the instance of either the decree holder or the judgment debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money

Defaulting purchaser answerable for loss on re sale

Sec 294 72 (1) No holder of a decree in execution of which property is sold shall without the express permission of the Court, bid for or purchase the property

Decree holder not to bid for or buy property without permission

(2) Where a decree holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73 be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly

Where decree holder purchases, amount of decree may be taken as payment

(3) Where a decree holder purchases, by himself or through another person, without such permission the Court may, if it thinks fit, on the application of the judgment debtor or any other person whose interests are affected by the sale, by order set aside the sale, and the costs of such application and order, and any deficiency of price which may happen on the re sale and all expenses attending it, shall be paid by the decree-holder

Sec 292 73. No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire an interest in the property sold

Restriction on bidding or purchase by officers

Sale of moveable property

Sale of agricultural produce

74. (1) Where the property to be sold is agricultural produce, the sale shall be held,— New.

(a) if such produce is a growing crop, on or near the land on which such crop has grown or

(b) if such produce has been cut or gathered, at or near the threshing floor or place for treading out grain or the like or fodder-stack on or in which it is deposited

Provided that the Court may direct the sale to be held at the nearest place of public resort if it is of opinion that the produce is thereby likely to sell to greater advantage

(2) Where, on the produce being put up for sale,—

(a) a fair price in the estimation of the person holding the sale, is not offered for it and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale the next market day, the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce

Special provisions relating to growing crops

75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing New

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered and the purchaser shall be entitled to enter on the land and to do all that is necessary for the purpose of tending and cutting or gathering it

Negotiable instruments and shares in corporations

76 Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker Sec 296

Sale by public auction.

77 (*1*) Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property *shall forthwith be re sold* Sec 297

(*2*) On payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute

(*3*) Where the moveable property to be sold is a share in goods belonging to the judgment debtor and a co owner, and two or more persons, of whom one is such co owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner. New.

Sec 298 **78** No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale, but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery

Irregularity not to vitiate sale but any person injured may sue

Sec 299 *Delivery of moveable property, debts and shares*

79 (1) Where the property sold is moveable property of which actual seizure has been made it shall be delivered to the purchaser

Sec 300 (2) Where the property sold is moveable property in the possession of some person other than the judgment debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser

Sec 301 (3) Where the property sold is a debt not secured by a negotiable instrument or is a share in a corporation the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon and the debtor from making payment thereof to any person except the purchaser or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser or receiving payment of any dividend or interest thereon and the manager secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser

Sec. 302 **80** (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary and such execution or endorsement shall have the same effect as an execution or endorsement by the party

Transfer of negotiable instruments and shares

(2) Such execution or endorsement may be in the following form, namely —

A B by C D Judge of the Court of (or as the case may be) in a suit by E F against A B

(3) Until the transfer of such negotiable instrument or share the Court may by order appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself

Sec 303 **81** In the case of any moveable property not hereinbefore provided for the Court may make an order vesting such property in the purchaser or as he may direct, and such property shall vest accordingly.

Vesting order in case of other property.

Sale of immoveable property

Sec 304. *What Courts may order sales*

82 Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes

83 (1) Where an order for the sale of immoveable property has been made if the judgment debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property or some part thereof, or of any other immoveable property of the judgment debtor the Court may, on his application postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount Sec 305

Postponement of sale to enable judgment debtor to raise amount of decree

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein and notwithstanding anything contained in section 64 to make the proposed mortgage, lease or sale

Provided that all monies payable under such mortgage lease or sale shall be paid, not to the judgment debtor but save in so far as a decree holder is entitled to set off such money under the provisions of rule 72 into Court

Provided also that no mortgage lease or sale under this rule shall become absolute until it has been confirmed by the Court

(3) Nothing in this rule shall be deemed to apply, to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on such property

84 (1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty five per cent on the amount of his purchase money to the officer or other person conducting the sale and, in default of such deposit the property shall forthwith be re sold Sec 306

Deposit by purchaser and re sale on default

(2) Where the decree holder is the purchaser and is entitled to set off the purchase money under rule 72 the Court may dispense with the requirements of this rule

85 The full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property Sec 307

Time for payment in full of purchase money

Provided that in calculating the amount to be so paid into Court the purchaser shall have the advantage of any set off to which he may be entitled under rule 72

86 In default of payment within the period mentioned in the last preceding rule the deposit may if the Court thinks fit after defraying the expenses of the sale be forfeited to the Government and the property shall be re sold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold Sec 308

Procedure in default of payment

87 Every re sale of immoveable property, in default of payment of the purchase money within the period allowed for such payment shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale Sec 309

Notification on re sale

Sec 310 **88** Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co sharer

Bid of co sharer to have preference

Sec 310A **89** (1) Where immoveable property has been sold in execution of a decree any person either owning such property or holding an interest therein by virtue of a title acquired before such sale may apply to have the sale set aside on his depositing in Court —

Application to set aside sale on deposit

(a) for payment to the purchaser a sum equal to five per cent of the purchase money, and

(b) for payment to the decree holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may since the date of such proclamation of sale have been received by the decree holder

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property he shall not unless he withdraws his application be entitled to make or prosecute an application under this rule

(3) Nothing in this rule shall relieve the judgment debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale

Sec 311 **90** (1) Where any immoveable property has been sold in execution of a decree the decree holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it

Application to set aside sale on ground of irregularity or fraud

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud

Sec 313 **91** The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale on the ground that the judgment debtor had no saleable interest in the property sold

Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest

Secs 312, 314 **92** (1) Where no application is made under rule 89 rule 90 or rule 91 or where such application is made and disallowed the Court shall make an order confirming the sale, and thereupon the sale shall become absolute

Sale when to become absolute or be set aside

(2) Where such application is made and allowed and where, in the case of an application under rule 89 the deposit required by that rule is made within thirty days from the date of sale the Court shall make an order setting aside the sale

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made

Return of purchase money in certain cases

93 Where a sale of immoveable property is set aside under rule 92 the purchaser shall be entitled to an order for repayment of his purchase money with or without interest as the Court may direct against any person to whom it has been paid Sec 315

Certificate to purchaser

94 Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser Such certificate shall bear date the day on which the sale become absolute Sec 316

Delivery of property in occupancy of judgment debtor

95 Where the immoveable property sold is in the occupancy of the judgment debtor or of some person on his behalf or of some person claiming under a title created by the judgment debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94 the Court shall on the application of the purchaser order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property and if need be by removing any person who refuses to vacate the same Sec 318

Delivery of property in occupancy of tenant

96 Where the property sold is in the occupancy of a tenant or other per ... certificate in ... rule 94 the ... purchaser *order delivery to be mac ... of sale in* some conspicuous place or ... occupant by beat of drum or other customary mode at some convenient place that the interest of the judgment debtor has been transferred to the purchaser Sec 319

Resistance to delivery of possession to decree holder or purchaser

Resistance or obstruction to possession of immoveable property

97 (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property he may make an application to the Court complaining of such resistance or obstruction Secs 328 334

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

Resistance or obstruction by judgment debtor

98 Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor or by some other person at his instigation it shall direct that the applicant be put into possession of the property and where the applicant is still resisted or obstructed in obtaining possession the Court may also at the instance of the applicant order the judgment debtor or any person acting at his instigation to be detained in the civil prison for a term which may extend to thirty days Secs 329, 330

Secs 331, 335

Resistance or obstruction by bonâ fide claimant

99 Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor, the Court shall make an order dismissing the application

Sec 332

Dispossession by decree holder or purchaser

100 (1) Where any person other than the judgment debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

Secs 332, 335

Bona fide claimant to be restored to possession

101 Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment debtor, it shall direct that the applicant be put into possession of the property

Sec 333

Rules not applicable to transferee lite pendente

102 Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person

Secs 332, 335

Orders conclusive subject to regular suit

103 Any party not being a judgment debtor against whom an order is made under rule 98 rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit if any, the order shall be conclusive

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ORDER XXII

Death Marriage and Insolvency of Parties

Sec 361

No abatement by party's death if right to sue survives

1 The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives

Sec 362

Procedure where one of several plaintiffs or defendants dies and right to sue survives

2 Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants

Secs 363 365, 366

Procedure in case of death of one of several plaintiffs or of sole plaintiff

3 (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf shall cause the legal

representative of the deceased plaintiff to be made a party [illegible] with the suit

(2) Where within the time limited by law no applica[illegible] sub rule (1) the suit shall abate so far as the deceased pl[illegible] and on the application of the defendant, the Court may [illegible] costs which he may have incurred in defending the suit to be [illegible] the estate of the deceased plaintiff

Procedure in case of death of one of several defendants or of sole defendant

4 (1) Where one of two or more defendants dies and [illegible] does not survive against the surviving [illegible] defendants alone, or a sole defendant [illegible] ving defendant dies and the right [illegible] the Court on an application made in that [illegible] shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit [illegible]

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant

(3) Where within the time limited by law no application is made under sub rule (1), the suit shall abate as against the deceased defendant

Determination of question as to legal representative

5 Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant such question shall be determined by the Court [illegible]

No abatement by reason of death after hearing

6. Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not there shall be no abatement by reason of the death of either party between the conclusion of the hearing and pronouncing of the judgment but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place O 17, r 1 (E. R.)

Suit not abated by marriage of female party

7 (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate but the suit may notwithstanding be proceeded with to judgment and where the decree is against a female defendant it may be executed against her alone Sec [illegible]

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court be executed against the husband also and in case of judgment for the wife execution of the decree may, with such permission be issued upon the application of the husband, where the husband is by law entitled to the subject matter of the decree

[illegible]

8 (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his cre- [illegible] unless such [illegible] the suit or [illegible] give security Sec 370

Procedure where assignee fails to continue suit or give security

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so [illegible]rdered the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the

suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate

Sec 371 — Effect of abatement or dismissal

9 (1) Where a suit abates or is dismissed under this Order no fresh suit shall be brought on the same cause of action

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal and if it is proved that he was prevented by any sufficient cause from continuing the suit the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit

Sec 372A — (3) The provisions of section 5 of the Indian Limitation Act, XV of 1877, shall apply to applications under sub rule (2)

Sec 372 — Procedure in case of assignment before final order in suit

10 (1) In other cases of an assignment creation or devolution of any interest during the pendency of a suit, the suit may by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub rule (1)

Sec. 582, last para — Application of Order to appeals

11 In the application of this Order to appeals, so far as may be the word plaintiff shall be held to include an appellant the word defendant a respondent, and the word ' suit an appeal

New — Application of Order to proceedings

12. Nothing in rules 3 4 and 8 shall apply to proceedings in execution of a decree or order

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ORDER XXIII

Withdrawal and Adjustment of Suits.

Sec. 373 — Withdrawal of suit or abandonment of part of claim

1 (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants withdraw his suit or abandon part of his claim

(2) *Where the Court is satisfied*—

(a) that a suit must fail by reason of some formal defect or,

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

it may on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim without *the permission referred to in sub rule (2) he shall be liable for* such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim

(4) *Nothing in this rule* shall be *deemed* to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others

Limitation law not affected by first suit

2 In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted Sec 374

Compromise of suit

3 Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit Sec 375

Proceedings in execution of decrees not affected

4 Nothing in this Order shall apply to any proceedings in execution of a decree or order Sec 375A

ORDER XXIV

Payment into Court

Deposit by defendant of amount in satisfaction of claim

1 The defendant in any suit to recover a debt or damages may at any stage of the suit deposit in Court such sum of money as he considers a satisfaction in full of the claim Sec 376

Notice of deposit

2 Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application Sec 377

Interest on deposit not allowed to plaintiff after notice

3 No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice whether the sum deposited is in full of the claim or falls short thereof Sec 378

Procedure where plaintiff accepts deposit as satisfaction in part

4 (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim he may prosecute his suit for the balance and if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff s claim the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto so far as they were caused by excess in the plaintiff s claim Sec 379

Procedure where plaintiff accepts deposit as satisfaction in full

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly, and in directing by whom the costs of each party are to be paid the Court shall consider which of the parties is most to blame for the litigation

Illustrations

(a) A owes B Rs 100 B sues A for the amount having made no demand for payment and having no reason to believe that the delay caused by making a demand

would place him at a disadvantage On the plaint being filed, A pays the money into Court B accepts it in full satisfaction of his claim, but the Court should not allow him any costs the litigation being presumably groundless on his part

(b) B sues A under the circumstances mentioned in illustration (a) On the plaint being filed A disputes the claim Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim The Court should also give B his costs of suit A s conduct having shown that the litigation was necessary

(c) A owes B Rs 100 and is willing to pay him that sum without suit B claims Rs 150 and sues A for that amount On the plaint being filed A pays Rs 100 into Court and disputes only his liability to pay the remaining Rs 50 B accepts the Rs 100 in full satisfaction of his claim The Court should order him to pay A s costs

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ORDER XXV

Security for Costs

Sec 380, Para 1

When security for costs may be required from plaintiff

1 (1) Where, at any stage of a suit it appears to the Court that a sole plaintiff is or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant

Sec 382

Residence out of British India

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub rule (1)

Sec 380, Para 2

(3) On the application of any defendant in a suit for the payment of money in which the plaintiff is a woman the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India

Sec 381

Effect of failure to furnish security

2 (1) In the event of such security not being furnished within the time fixed the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed the Court shall set aside the dismissal upon such terms as to security, cost or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant

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ORDER XXVI

Commissions

Commissions to examine witnesses

Cases in which Court may issue commission to examine witness

1. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it Sec 383.

Order for commission

2. An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application supported by affidavit or otherwise of any party to the suit or of the witness to be examined Sec 384

Where witness resides within Court's jurisdiction

3 A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute Sec 385.

Persons for whose examination commission may issue

4 (1) Any Court may in any suit issue a commission for the examination of— Sec 386

(*a*) any person resident beyond the local limits of its jurisdiction,

(*b*) any person who is about to leave such limits before the date on which he is required to be examined in Court, and

(*c*) any civil or military officer of the Government who cannot, in the opinion of the Court attend without detriment to the public service

(2) Such commission may be issued to any Court not being a High Court within the local limits of whose jurisdiction such person resides or to any pleader or other person whom the Court issuing the commission may appoint

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court

Commission or Request to examine witness not within British India

5 Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request Sec 387

Court to examine witness pursuant to commission

6 Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto Sec 388

Return of commission with depositions of witnesses

7 Where a commission has been duly executed it shall be returned, together with the evidence taken under it, to the Court from which it was issued unless the order for issuing the commission has otherwise directed in which case the commission shall be returned in terms of such order, and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit Sec 389

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(*c*) any civil or military officer of the Government who cannot, in the opinion of the Court attend without detriment to the public service

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides or to any pleader or other person whom the Court issuing the commission may appoint

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court

Commission or Request to examine witness not within British India

5 Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request Sec 387

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6 Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto Sec 388

Return of commission with depositions of witnesses

7 Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order, and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit Sec 389

Sec 390 When depositions may be read in evidence

8 Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) The person who gave the evidence is beyond the jurisdiction of the Court or dead or unable from sickness or infirmity to attend to be personally examined or exempted from personal appearance in Court or is a civil or military officer of the Government who cannot in the opinion of the Court attend without detriment to the public service or

(b) The Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a) and authorizes the evidence of any person being read as evidence in the suit notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same

Commissions for local investigations

Sec 392. Commissions to make local investigations

9 In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued the Court shall be bound by such rules

Sec 393 Procedure of Commissioner

10 (1) The Commissioner after such local inspection as he deems necessary and after reducing to writing the evidence taken by him shall return such evidence, together with his report in writing signed by him, to the Court

Report and depositions to be evidence in suit

Commissioner may be examined in person

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the Court or with the permission of the Court any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner it may direct such further inquiry to be made as it shall think fit

Commissions to examine accounts

Sec 394 Commission to examine or adjust accounts

11 In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment

12 (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry or also to report his own opinion on the point referred for his examination Sec 395

Court to give Commissioner necessary instructions

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit but where the Court has reason to be dissatisfied with them it may direct such further inquiry as it shall think fit

Proceedings and report to be evidence Court may direct further inquiry

Commission to make partitions

13 Where a preliminary decree for partition has been passed the Court may in any case not provided for by section 54 issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree Sec 396

Commission to make partition of immoveable property

14 (1) The Commissioner shall after such inquiry as may be necessary divide the property into as many shares as may be directed by the order under which the commission was issued and shall allot such shares to the parties and may if authorized thereto by the said order award sums to be paid for the purpose of equalizing the value of the shares Sec 396 Paras 2 3

Procedure of Commissioner

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and
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commission and transmitted to the Court and the Court after hearing any objections which the parties may make to the report or reports shall confirm vary or set aside the same

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit

General provisions

15 Before issuing any commission under this Order the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be within a time to be fixed paid into Court by the party at whose instance or for whose benefit the commission is issued Sec 397

Expenses of commission to be paid into Court

16 Any Commissioner appointed under this Order may unless otherwise directed by the order of appointment — Sec 398

Powers of Commissioners

(*a*) examine the parties themselves and any witness whom they or any of them may produce and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him

(*b*) call for and examine documents and oth
subject of inquiry

(c) at any reasonable time enter upon or into any land or building mentioned in the order

Sec 399. 17 (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court

Attendance and examination of witnesses before Commissioner

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness and such Court may, in its discretion, issue such process as it considers reasonable and proper

Sec 400 18 (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders

Parties to appear before Commissioner

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence

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ORDER XXVII

Suits by or against the Government or Public Officers in their official capacity

New 1 In any suit by or against the Secretary of State for India in Council, the plaint or written statement shall be signed by such person as the Government may by general or special order appoint in this behalf and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case

Suits by or against Government

Sec 417 2 Persons being *ex officio* or otherwise authorized to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances acts and applications under this Code may be made or done on behalf of the Government

Persons authorized to act for Government

Sec 418 3 In suits by or against the Secretary of State for India in Council instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant it shall be sufficient to insert the words 'The Secretary of State for India in Council

Plaints in suits by or against Government

Sec 419 4 The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court

Agent for Government to receive process

5. The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion — Sec 420

Fixing of day for appearance on behalf of Government

6. The Court may also in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit direct the attendance of such a person — Sec 421.

Attendance of person able to answer questions relating to suit against Government.

7 Where the defendant is a public officer and on receiving the summons considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel — Sec 423

Extension of time to enable public officer to make reference to Government

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary

8 (1) Where the Government undertakes the defence of a suit against a public officer the Government pleader upon being furnished with authority to appear and answer the plaint shall apply to the Court and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits — Sec 426

Procedure in suits against public officer

(2) Where no application under sub rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer the case shall proceed as in a suit between private parties — Sec 427

Provided that the defendant shall not be liable to arrest nor his property to attachment, otherwise than in execution of a decree

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ORDER XXVIII

Suits by or against Military Men

1 (1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person he may authorize any person to sue or defend in his stead — Sec. 465

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of ([illegible] next subordinate officer, if the party is [illegible] or (*b*) where the officer or soldier is servi[illegible] the head or other superior officer of the office in which he is employed Such commanding or other officer shall countersign the authority, which shall be filed in Court

(c) at any reasonable time enter upon or into any land or building mentioned in the order

Sec 399. **17** (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court

Attendance and examination of witnesses before Commissioner

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may in its discretion, issue such process as it considers reasonable and proper

Sec 400 **18** (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders

Parties to appear before Commissioner

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence

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ORDER XXVII

Suits by or against the Government or Public Officers in their official capacity

New **1** In any suit by or against the Secretary of State for India in Council the plaint or written statement shall be signed by such person as the Government may, by general or special order appoint in this behalf and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case

Suits by or against Government

Sec 417 **2** Persons being *ex officio* or otherwise authorized to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government

Persons authorized to act for Government

Sec. 418 **3** In suits by or against the Secretary of State for India in Council instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "The Secretary of State for India in Council

Plaints in suits by or against Government

Sec 419 **4** The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court

Agent for Government to receive process

5. The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint shall allow a reasonable time for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion Sec 420

Fixing of day for appearance on behalf of Government

6. The Court may also in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council who may be able to answer any material questions relating to the suit direct the attendance of such a person Sec 421

Attendance of person able to answer questions relating to suit against Government.

7 Where the defendant is a public officer and on receiving the summons considers it proper to make a reference to the Government before answering the plaint he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel Sec 423

Extension of time to enable public officer to make reference to Government

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary

8 (1) Where the Government undertakes the defence of a suit against a public officer the Government pleader upon being furnished with authority to appear and answer the plaint shall apply to the Court and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits Sec 426

Procedure in suits against public officer

(2) Where no application under sub rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer the case shall proceed as in a suit between private parties Sec 427

Provided that the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree

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ORDER XXVIII

Suits by or against Military Men

1 (1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person he may authorize any person to sue or defend in his stead Sec. 465

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (e next subordinate officer if the party is or (*b*) where the officer or soldier is servi the head or *other superior officer of the office in which he is employed* Such commanding or other officer shall countersign the authority, which shall be filed in Court

(c) at any reasonable time enter upon or into any land or building mentioned in the order

Sec 399. 17 (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court

Attendance and examination of witnesses before Commissioner

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness and such Court may, in its discretion, issue such process as it considers reasonable and proper

Sec 400 18 (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders

Parties to appear before Commissioner

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence

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ORDER XXVII

Suits by or against the Government or Public Officers in their official capacity

New 1 In any suit by or against the Secretary of State for India in Council the plaint or written statement shall be signed by such person as the Government may by general or special order appoint in this behalf and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case

Suits by or against Government

Sec 417 2 Persons being *ex officio* or otherwise authorized to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances acts and applications under this Code may be made or done on behalf of the Government

Persons authorized to act for Government

Sec 418 3 In suits by or against the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant it shall be sufficient to insert the words 'The Secretary of State for India in Council

Plaints in suits by or against Government

Sec 419 4 The Government pleader in any Court or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court

Agent for Government to receive process

5. The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government, and may extend the time at its discretion Sec 420

Fixing of day for appearance on behalf of Government

6. The Court may also in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person Sec 421.

Attendance of person able to answer questions relating to suit against Government

7 Where the defendant is a public officer and, on receiving the summons considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel Sec 423

Extension of time to enable public officer to make reference to Government

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary

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ORDER XXVIII

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Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed Such commanding or other officer shall countersign the authority, which shall be filed in Court

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person

Explanation—In this Order the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer or soldier belongs

Sec 466 — Person so authorized may act personally or appoint pleader

2. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier

Sec 467 — Service on persons so authorized or on his pleader, to be good service

3 Processes served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person

ORDER XXIX

Suits by or against Corporations

Sec 435 — Subscription and verification of pleading

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case

Sec 436 — Service on corporation

2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business

Sec. 437 — Power to require personal attendance of officer of corporation

3. The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit

ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own

O 48 A, r 1 (E R) — Suing of partners in name of firm.

1 (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accru-

ing of the cause of action and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action partners in such firm to be furnished and verified in such manner as the Court may direct

(2) Where persons sue or are sued as partners in the name of their firm under sub rule (1) it shall in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant suffice if such pleading or other document is signed, verified or certified by any one of such persons

Disclosure of partners names

2 (1) Where a suit is instituted by partners in the name of their firm the plaintiffs or their pleader shall on demand in writing by or on behalf of any defendant forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted — O 48 A r 2 (E R)

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub rule (1) all proceedings in the suit may upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub rule (1) the suit shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as plaintiffs in the plaint

Provided that all the proceedings shall nevertheless continue in the name of the firm

Service

3 Where persons are sued as partners in the name of their firm the summons shall be served either— — O 48 A r 3 (E R)

(a) upon any one or more of the partners or

(b) at the principal place at which the partnership business is carried on within British India upon any person having at the time of service, the control or management of the partnership business there

as the Court may direct and such service shall be deemed good service upon the firm so sued whether all or any of the partners are within or without British India

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit the summons shall be served upon every person within British India whom it is sought to make liable

Right of suit on death of partner

4 (1) Notwithstanding anything contained in section 45 of the Indian Contract Act IX of 1872 where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit — New

(2) Nothing in sub rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit or

(b) to enforce any claim against the survivor or survivors.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person

Explanation—In this Order the expression 'commanding officer' means the officer in actual command for the time being of any regiment corps, detachment or depot to which the officer or soldier belongs

Sec 466 **2.** Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier

Person so authorized may act personally or appoint pleader

Sec 467 **3** Processes served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person

Service on persons so authorized or on his pleader to be good service

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ORDER XXIX

Suits by or against Corporations

Sec 435 **1.** In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case

Subscription and verification of pleading

Sec 436 **2** Subject to any statutory provision regulating service of process, where the suit is against a corporation the summons may be served—

Service on corporation

(a) on the secretary or on any director or other principal officer of the corporation or

(b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business

Sec 437 **3.** The Court may at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit

Power to require personal attendance of officer of corporation

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ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own

O 48 A, r 1 (E. R.) **1** (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accru-

Suing of partners in name of firm

ing of the cause of action and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action partners in such firm to be furnished and verified in such manner as the Court may direct

(2) Where persons sue or are sued as partners in the name of their firm under sub rule (1) it shall in the case of any pleading or other document required by or under this Code to be signed verified or certified by the plaintiff or the defendant suffice if such pleading or other document is signed, verified or certified by any one of such persons

Disclosure of partners names

O. 48 A, r. 2 (E. R.)

2. (1) Where a suit is instituted by partners in the name of their firm the plaintiffs or their pleader shall on demand in writing by or on behalf of any defendant forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub rule (1) all proceedings in the suit may upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub rule (1) the suit shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as plaintiffs in the plaint

Provided that all the proceedings shall nevertheless continue in the name of the firm

Service

O. 48 A, r. 3 (E. R.)

3. Where persons are sued as partners in the name of their firm the summons shall be served either—

(*a*) upon any one or more of the partners or

(*b*) at the principal place at which the partnership business is carried on within British India upon any person having at the time of service the control or management of the partnership business there

as the Court may direct and such service shall be deemed good service upon the firm so sued whether all or any of the partners are within or without British India

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit the summons shall be served upon every person within British India whom it is sought to make liable

Right of suit on death of partner

New

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act IX of 1872 where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies whether before the institution or during the pendency of any suit it shall not be necessary to join the legal representative of the deceased as a party to the suit

(2) Nothing in sub rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(*a*) to apply to be made a party to the suit or

(*b*) to enforce any claim against the survivor or survivors.

O. 48A, r 4 (E. R.) *Notice in what capacity served*

5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner

O 48 A, r 5 (E R) *Appearance of partners*

6. Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm

Ibid, r 6 (E R) *No appearance except by partners*

7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued

Ibid, r 7 (E. R) *Appearance under protest*

8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared

Ibid, r 10 (E R) *Suits between co partners*

9. This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common, but no execution shall be issued in such suits except by leave of the Court and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

Ibid, r 11 (E R) *Suit against person carrying on business in name other than his own*

10 Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name, and, so far as the nature of the case will permit, all rules under this Order shall apply

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ORDER XXXI

Suits by or against Trustees, Executors and Administrators

Sec 437. *Representation of beneficiaries in suits concerning property vested in trustees, etc*

1. In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit But the Court may, if it thinks fit, order them or any of them to be made parties

Sec 438 *Joinder of trustees, executors and administrators.*

2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them :

Provided that the executors who have not proved their testator's will and trustees, executors and administrators outside British India, need not be made parties

Husband of married executrix not to join

3 Unless the Court directs otherwise the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her Sec 439

ORDER XXXII

Suits by or against Minors and Persons of Unsound Mind

Minor to sue by next friend

1 Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor Sec 440

Where suit is instituted without next friend plaint to be taken off the file

2 (1) Where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the plaint taken off the file with costs to be paid by the pleader or other person by whom it was presented Sec 442

(2) Notice of such application shall be given to such person and the Court after hearing his objections (if any) may make such order in the matter as it thinks fit

Guardian for the suit to be appointed by Court for minor defendant

3 (1) Where the defendant is a minor the Court on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor Sec 443

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff Sec 456

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no such guardian upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian to the person in whose care the minor is and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule New

Who may act as next friend or be appointed guardian for the suit

4 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit Sec 445

Provided that the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend a defendant or in the case of a guardian for the suit, a plaintiff

[illegible] by competent next friend of the Court con Secs 440, 443

O 48A, r 4 (E R) — Notice in what capacity served

5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner

O 48 A, r 5 (E R) — Appearance of partners

6. Where persons are sued as partners in the name of their firm, they shall appear *individually* in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm

Ibid, r 6 (E R) — No appearance except by partners

7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business no appearance by him shall be necessary unless he is a partner of the firm sued

Ibid, r 7 (E R) — Appearance under protest

8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared

Ibid r 10 (E R) — Suits between co partners

9. This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common, but no execution shall be issued in such suits except by leave of the Court and on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just

Ibid, r 11 (E R) — Suit against person carrying on business in name other than his own

10 Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name, and, so far as the nature of the case will permit, all rules under this Order shall apply

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ORDER XXXI

Suits by or against Trustees Executors and Administrators

Sec 437 — Representation of beneficiaries in suits concerning property vested in trustees, etc

1. In all suits concerning property vested in a trustee, executor or administrator where the contention is between the persons beneficially interested in such property and a third person the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit But the Court may, if it thinks fit, order them or any of them to be made parties

Sec 438 — Joinder of trustees, executors and administrators

2. Where there are several trustees, executors or administrators they shall all be made parties to a suit against one or more of them

9 (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal, and the Court if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly and make such other order as to costs as it thinks fit Sec 446

Removal of next friend

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit

10 (1) On the retirement removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place Sec 448

Stay of proceedings on removal, etc, of next friend

(2) Where the pleader of such minor omits within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit Sec 449

11 (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit Sec 458

Retirement, removal or death of guardian for the suit.

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place Sec 459

12 (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application Sec 450

Course to be followed by minor plaintiff or applicant on attaining majority

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name Sec 451

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus —

"A B, late a minor, by C D, his next friend, but now having attained majority"

(4) Where he elects to abandon the suit or application he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend. Sec 452

siders for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be

New (3) No person shall without his consent be appointed guardian for the suit

Sec 456 (4) Where there is no other person fit and willing to act as guardian for the suit the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require

Sec 441 Representation of minor by next friend or guardian for the suit

5 (1) Every application to the Court on behalf of a minor other than an application under rule 10, sub rule 2) shall be made by his next friend or by his guardian for the suit

Sec 444 (2) Every order made in a suit or on any application before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit as the case may be may be discharged and where the pleader of the party at whose instance such order was obtained knew or might reasonably have known the fact of such minority with costs to be paid by such pleader

Sec 461 Receipt by next friend or guardian for the suit of property under decree for minor

6 (1) A next friend or guardian for the suit shall not without the leave of the Court receive any money or other moveable property on behalf of a minor either—

(*a*) by way of compromise before decree or order, or

(*b*) under a decree or order in favour of the minor

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor or having been so appointed or declared is under any disability known to the Court to receive the money or other moveable property, the Court shall if it grants him leave to receive the property require such security and give such directions as will in its opinion sufficiently protect the property from waste and ensure its proper application

Sec 462 Agreement or compromise by next friend or guardian for the suit

7 (1) No next friend or guardian for the suit shall without the leave of the Court expressly recorded in the proceedings enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor

Sec 447 Retirement of next friend

8 (1) Unless otherwise ordered by the Court a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed and also that he has no interest adverse to that of the minor

9 (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him or where he does not do his duty or during the pendency of the suit ceases to reside within British India or for any other sufficient cause application may be made on behalf of the minor or by a defendant for his removal and the Court if satisfied of the sufficiency of the cause assigned may order the next friend to be removed accordingly and make such other order as to costs as it thinks fit Sec 446

Removal of next friend

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared who desires to be himself appointed in the place of the next friend the Court shall remove the next friend unless it considers, for reasons to be recorded by it that the guardian ought not to be appointed the next friend of the minor and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit

10 (1) On the retirement removal or death of the next friend of a minor further proceedings shall be stayed until the appointment of a next friend in his place Sec 448

Stay of proceedings on removal etc of next friend

(2) Where the pleader of such minor omits within a reasonable time, to take steps to get a new next friend appointed any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one and the Court may appoint such person as it thinks fit Sec 449

11 (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear the Court may permit such guardian to retire or may remove him and may make such order as to costs as it thinks fit Sec 458

Retirement removal or death of guardian for the suit

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit the Court shall appoint a new guardian in his place Sec 459

12 (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall on attaining majority elect whether he will proceed with the suit or application Sec 450

Course to be followed by minor plaintiff or applicant on attaining majority

(2) Where he elects to proceed with the suit or application he shall apply for an order discharging the next friend and for leave to proceed in his own name Sec 451

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus —

"A B late a minor by C D his next friend but now having attained majority"

(4) Where he elects to abandon the suit or application he shall if a sole plaintiff or sole applicant apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend. Sec 452

Sec 453. (5) Any application under this rule may be made *ex parte* but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend

Sec 454 Where minor co plaintiff attaining majority desires to repudiate suit

13 (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co plaintiff, and the Court if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit

(2) Notice of the application shall be served on the next friend, on any co plaintiff and on the defendant

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs

(4) Where the applicant is a necessary party to the suit the Court may direct him to be made a defendant

Sec 455. Unreasonable or improper suit

14 (1) A minor on attaining majority may, if a sole plaintiff apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper

(2) Notice of the application shall be served on all the parties concerned, and the Court upon being satisfied of such unreasonableness or impropriety may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit

Sec 463 Application of rules to persons of unsound mind

15 The provisions contained in rules 1 to 14 so far as they are applicable shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued

Sec 464 Saving for Princes and Chiefs

16 Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor General in Council or a Local Government in the name of an agent or in any other name or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

ORDER XXXIII

Suits by Paupers

Sec 401. Suits may be instituted *in forma pauperis*

1 Subject to the following provisions any suit may be instituted by a pauper

Explanation—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not

entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit

Contents of application

2. Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto, and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings Sec 403

Presentation of application

3. Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person Sec 404

Examination of applicant.

4 (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant Sec 406

If presented by agent Court may order applicant to be examined by commission

(2) *** the Co cant be which the examination of an absent witness may be taken

Rejection of application

5 The Court shall reject an application for permission to sue as a pauper— Sec 407

(a) Where it is not framed and presented in the manner prescribed by rules 2 and 3 or Sec 405

(b) Where the applicant is not a pauper, or

(c) Where he has within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

(d) Whether his allegations do not show a cause of action, or

(e) Where he has entered into any agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter

Notice of day for receiving evidence of ap p r i

6 Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be [illegible] thereof Sec 408

Procedure at hearing

7 (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent and shall make a memorandum of the substance of their evidence Sec 409

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(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper

Sec 410 Procedure if application admitted 8 Where the application is granted it shall be numbered and registered and shall be deemed the plaint in the suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner except that the plaintiff shall not be liable to pay any court fee (other than fees payable for service of process) in respect of any petition appointment of a pleader or other proceeding connected with the suit

Sec 414 Dispaupering 9 The Court may on the application of the defendant or of the Government pleader of which seven days clear notice in writing has been given to the plaintiff order the plaintiff to be dispaupered—

(a) if he is guilty of vexatious or improper conduct in the course of the suit

(b) if it appears that his means are such that he ought not to continue to sue as a pauper, or

(c) if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject matter

Sec 411 Costs where pauper succeeds 10 Where the plaintiff succeeds in the suit the Court shall calculate the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject matter of the suit

Sec 412 Procedure where pauper fails 11 Where the plaintiff fails in the suit or is dispaupered or where the suit is withdrawn or dismissed —

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff or any person added as a co plaintiff to the suit to pay the court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper

New. Government may apply for payment of court fees 12 The Government shall have the right at any time to apply to the Court to make an order for the payment of court fees under rule 10, or rule 11

New Government to be deemed a party 13 All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47

Copy of decree to be sent to Collector

14 Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector New

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature

15 An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue, but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by Government and by the opposite party in opposing his application for leave to sue as a pauper Sec 413

Costs

16 The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit Sec 415

ORDER XXXIV

Suits relating to Mortgages of Immoveable Property

Parties to suits for foreclosure sale and redemption

1 Subject to the provisions of this Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage Sec 85

Explanation —A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit, and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage

Preliminary decree in foreclosure suit

2 In a suit for foreclosure if the plaintiff succeeds, the Court shall pass a decree— Sec 86

(*a*) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter, referred to, or

(*b*) declaring the amount so due at the date of such decree, and directing

(*c*) that if the defendant pays into Court the amount so due on a day within *six* months from the date of declaring in Court the amount so due to be fixed by the Court the plaintiff shall deliver up to the defendant or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required re transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(*d*) that if such payment is not made on or before the day to be *fixed* by the Court, that the defendant shall be debarred from all right to redeem the property

Final decree in foreclosure suit

3 (1) Where, on or before the day fixed, the defendant pays into Court the amount declared *due* as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree— Sec 87.

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in *the said decree*, and, also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff pass a decree that the defendant and all [illegible] him be debarred from all right to redeem [illegible] necessary, ordering the defendant to put [illegible] operty

Power to enlarge time

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment

Discharge of debt

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged

Sec 88

Preliminary decree in suit for sale

4 (1) In a suit for sale if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs and that balance (if any) be paid to the defendant or other persons entitled to receive the same

Power to decree sale in foreclosure suit

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure the performance of the terms

Sec. 89

Final decree in suit for sale

5 (1) Where on before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree, and also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4.

6 Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount Sec 90

Recovery of balance due on mortgage

Preliminary decree in redemption suit

7 In a suit for redemption if the plaintiff succeeds the Court shall pass a decree— Sec 92

(a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree and directing—

(c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court the defendant shall deliver up to the plaintiff or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall if so required re transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims and shall if necessary put the plaintiff in possession of the property but

(d) that if such payment is not made on or before the day to be fixed by the Court the plaintiff shall (unless the mortgage is is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold

Final decree in redemption suit

8 (1) Where on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree— Sec. 93

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree

and, also, if necessary

(c) ordering him to put the plaintiff in possession of the property

(2) Where such payment is not so made and the mortgage is not simple or usufructuary the Court shall on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary ordering the plaintiff to put the defendant in possession of the property

(3) On the passing of a decree under sub rule (2) the debt secured by the mortgage shall be deemed to be discharged

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying there out the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same

Power to enlarge time

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit from time to time postpone the day fixed for payment

New.

Decree where nothing is found due or where mortgagee has been overpaid

9 Notwithstanding anything hereinbefore contained if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid the Court shall pass a decree directing the defendant if so required, to re transfer the property and to pay to the plaintiff the amount which may be found due to him, and the plaintiff shall, if necessary, be put in possession of the mortgaged property

Sec. 94.

Costs of mortgagee subsequent to decree

10 In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs add to the mortgage money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption upto the time of actual payment

New.

Right of mesne mortgagee to redeem and foreclose

11 Where property is mortgaged for successive debts to successive mortgagees any mesne mortgagee may institute a suit to redeem the interest of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor

Sec 96

Sale of property subject to prior mortgage

12 Where any property the sale of which is directed under this Order is subject to a prior mortgage the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold

Sec 97

Application of proceeds.

13 (1) Such proceeds shall be brought into Court and applied as follows —

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale,

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs properly incurred in connection therewith,

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made,

fourthly, in payment of the principal money due on account of that mortgage, and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt

(2) Nothing in this rule or in rule 12 shall be deemed to affect the *powers conferred by section 57 of the Transfer of Property Act, IV of 1882.*

Suit for sale necessary for bringing mortgaged property for sale

14 (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2 Sec 99

(2) Nothing in sub rule (1) shall apply to any territories to which the Transfer of Property Act IV of 1882 has not been extended

Charges

15 All the provisions contained in this Order as to the sale or redemption of mortgaged property shall so far as may be apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, IV of 1882 Sec 100.

ORDER XXXV

Interpleader

Plaint in interpleader suit

1 In every suit of interpleader the plaint shall, in addition to the other statements necessary for plaints state— Sec 471

(*a*) that the plaintiff claims no interest in the subject matter in dispute other than for charges or costs

(*b*) the claims made by the defendants severally, and

(*c*) that there is no collusion between the plaintiff and any of the defendants

Payment of thing claimed into Court

2. Where the thing claimed is capable of being paid into Court or placed in the custody of the Court the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit Sec 472

Procedure where defendant is suing plaintiff

3 Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit the Court in which the suit against the plaintiff is pending shall on being informed by the Court in which the interpleader suit has been instituted stay the proceedings as against him and his costs in the suit so stayed may be provided for in such suit but if and in so far as they are not provided for in that suit they may be added to his costs incurred in the interpleader suit Sec 476

Procedure at first hearing

4 (1) At the first hearing the Court may—

(*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed award him his costs and dismiss him from the suit, or Sec 473

(*b*) if it thinks that justice or convenience so required, retain all parties until the final disposal of the suit

(2) Where the *Court* finds that the admissions of the parties or other evidence enable it to do so it may adjudicate the title to the thing claimed

(3) Where the admissions of the parties do not enable the Court so to adjudicate it may direct—

(*a*) that an issue or issues between the parties be framed and tried, and

(*b*) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff

and shall proceed to try the suit in the ordinary manner

Sec 474. Agents and tenants may not institute interpleader suits

5 Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords

Illustrations

(*a*) A deposits a box of jewels with B as his agent C alleges that the jewels were wrongfully obtained from him by A and claims them from B B cannot institute an interpleader suit against A and C

(*b*) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C s debt is satisfied and C alleges the contrary Both claim the jewels from B B may institute an interpleader suit against A and C

Sec 475 Charge for plaintiff's costs

6 Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way

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ORDER XXXVI

Special Case

Sec 527 Power to state case for Court s opinion

1 (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court and providing that, upon the finding of the Court with respect to such question

(*a*) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them, or

(*b*) some property, moveable or immoveable specified in the agreement, shall be delivered by one of the parties to the other of them, or

(*c*) one or more of the parties shall do or refrain from doing some other particular act specified in the agreement

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby

Where value of subject matter must be stated

2 Where the agreement is for the delivery of any property, or for the doing or the refraining from doing any particular act the estimated value of the property to be delivered, or to which the act specified has reference shall be stated in the agreement Sec 528

Agreement to be filed and registered as suit

3 (1) The agreement if framed in accordance with the rules herein before contained may be filed in the Court which would have jurisdiction to entertain a suit the amount or value of the subject matter of which is the same as the amount or value of the subject matter of the agreement Sec 529

(2) The agreement when so filed shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs and the other or the others of them as defendant or defendants and notice shall be given to all the parties to the agreement other than the party or parties by whom it was presented

Parties to be subject to Court's jurisdiction

4 Where the agreement has been filed the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein Sec 530

Hearing and disposal of case

5 (1) The case shall be set down for hearing as a suit instituted in the ordinary manner and the provisions of this Code shall apply to such suit so far as the same are applicable Sec 531

(2) Where the Court is satisfied after examination of the parties or after taking such evidence as it thinks fit —

(a) that the agreement was duly executed by them

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided

it shall proceed to pronounce judgment thereon in the same way as in an ordinary suit and upon the judgment so pronounced a decree shall follow

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ORDER XXXVII

Summary Procedure on Negotiable Instruments

Application of Order

1 This Order shall apply only to— Sec 538

(a) the High Courts of Judicature at Fort William Madras and Bombay,

(b) the Chief Court of Lower Burma

(c) the Court of the Judicial Commissioner of Sind and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure XIV of 1882 have been already applied

Sec 532 2 (1) All suits upon bills of exchange hundis or promissory notes may in case the plaintiff desires to proceed hereunder be instituted by presenting a plaint in the form prescribed but the summons shall be in Form No 4 in Appendix B or in such other form as may be from time to time prescribed

Institution of summary suits upon bills of exchange etc

(2) In any case in which the plaint and summons are in such forms, respectively the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend, and in default of his obtaining such leave or of his appearance and defence in pursuance thereof the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified if any) to the date of the decree and such sum for costs as may be prescribed unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way and such decree may be executed forthwith

Sec 533 3 (1) The Court shall upon application by the defendant give leave to appear and to defend the suit upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application

Defendant showing defence on merits to have leave to appear

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court giving security framing and recording issues or otherwise as the Court thinks fit

Sec 534 4, After decree the Court may under special circumstances set aside the decree and if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit if it seems reasonable to the Court so to do and on such terms as the Court thinks fit

Power to set aside decree

Sec. 535 5 In any proceeding under this Order the Court may order the bill hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof

Power to order bill etc to be deposited with officer of Court

Sec 536 6 The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of expenses incurred in noting the same for non acceptance or non payment or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note

Recovery of cost of noting non acceptance of dishonoured bill or note

Sec 537 7 Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner

Procedure in suits

ORDER XXXVIII

Arrest and Attachment before Judgment

Arrest before Judgment

Where defendant may be called upon to furnish security for appearance

1 Where at any stage of a suit, other than a suit of the nature referred to in section 16 clauses (*a*) to (*d*), the Court is satisfied by affidavit or otherwise,— Sec 477

(*a*) that the defendant with intent to delay the plaintiff or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him —

(*i*) has absconded or left the local limits of the jurisdiction of the Court, or

(*ii*) is about to abscond or leave the local limits of the jurisdiction of the Court or

(*iii*) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof or

(*b*) that the defendant is about to leave British India under circumstance affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance Sec 478

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court

Security

2 (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule Sec 479

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance to pay any sum of money which the defendant may be ordered to pay in the suit

Procedure on application by surety to be discharged

3 (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation Sec 480

(2) On such application being made the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance

(3) On the appearance of the defendant in pursuance of the summons or warrant or on his voluntary surrender the Court shall direct the surety

to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Sec 481 4 Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied

Procedure where defendant fails to furnish security or find fresh security

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees

Provided also that no person shall be detained in prison under this rule after he has complied with such order

Attachment before Judgment

Secs 483, 484 5 (1) Where at any stage of a suit the Court is satisfied by affidavit or otherwise, that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant within a time to be fixed by it, either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security

(2) The plaintiff shall unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified

Sec 485 6 (1) Where the defendant fails to show cause why he should not furnish security or fails to furnish the security required within the time fixed by the Court, the Court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached

Attachment where cause not shown or security not furnished

(2) Where the defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit

Sec 486 7 Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree

Mode of making attachment.

Sec 487 8 Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

Investigation of claim to property attached before judgment

9. Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed Sec 488

Removal of attachment when security furnished or suit dismissed.

10 Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree Sec 489

Attachment before judgment not to affect rights of strangers, nor bar decree holder from applying for sale

11. Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff it shall not be necessary upon an application for execution of such decree to apply for a re attachment of the property Sec. 490

Property attached before judgment not to be re attached in execution of decree

12. Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist or to empower the Court to order the attachment or production of such produce New.

Agricultural produce not attachable before judgment

ORDER XXXIX

Temporary Injunctions and Interlocutory Orders

Temporary Injunctions

Sec 492

Cases in which temporary injunction may be granted

1 Where in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders

2 (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right Sec 493

Injunction to restrain repetition or continuance of breach

(2) The Court may by *order grant such injunction, on such terms* as to the duration of the injunction, keeping an account, giving security, or otherwise, as the *Court thinks fit*

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release

(4) No attachment under this rule shall remain in force for more than one year at the end of which time if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit and shall pay the balance, if any, to the party entitled thereto

Sec 494 — Before granting injunction Court to direct notice to opposite party

3 The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction direct notice of the application for the same to be given to the opposite party

Sec 496 — Order for injunction may be discharged varied or set aside

4 Any order for an injunction may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order

Sec 495 — Injunction to corporation binding on its officers

5 *An injunction directed to a corporation is* binding not only on the corporation itself, but also on all *members and officers of the corporation* whose personal action it seeks to restrain

Interlocutory Orders

Sec 498 — Power to order interim sale

6 The Court may on the application of any party to a suit, order the sale by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property being the subject matter of such suit or attached before judgment in such suit, which is subject to speedy and natural decay or which for any other just and sufficient cause it may be desirable to have sold at once

Sec 499 — Detention preservation inspection etc, of subject matter of suit

7 (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

(*a*) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein

(*b*) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit, and

(*c*) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule

Application for such orders to be after notice

8 (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit Sec 500

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance

When party may be put in immediate possession of land the subject matter of suit

9 Where land paying revenue to Government or a tenure liable to sale, is the subject matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court) be put in immediate possession of the land or tenure, Sec 501

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit

Deposit of money, etc, in Court

10 Where the subject matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court Sec 502

ORDER XL

Appointment of Receivers

Appointment of receivers

1 (1) Where it appears to the Court to be just and convenient, the Court may by order— Sec 503.

(a) appoint a receiver of any property whether before or after decree,

(b) remove any person from the possession or custody of the property,

(c) commit the same to the possession, custody or management of the receiver, and

(d) confer upon the receiver all such powers as to bringing and

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove

Sec. 503 — Remuneration.

2 The Court may by general or special order fix the amount *to be* paid as remuneration for the services of the receiver

Sec 503 — Duties

3 Every receiver so appointed shall—

(*a*) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property,

(*b*) submit his accounts at such periods and in such form as the Court directs,

(*c*) pay the amount due from him as the Court directs, and

(*d*) be responsible for any loss occasioned to the property by his wilful default or gross negligence

New — Enforcement of receiver's duties

4 Where a receiver—

(*a*) fails to submit his accounts at such periods and in such form as the Court directs, or

(*b*) fails to pay the amount due from him as the Court directs or

(*c*) occasions loss to the property by his wilful default or gross negligence

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him and shall pay the balance (if any) to the receiver

Sec 504 — When Collector may be appointed receiver

5 Where the property is land paying revenue to the Government or land of which the revenue has been assigned or redeemed and the Court considers that the interests of those concerned will be promoted by the management of the Collector the Court may, with the consent of the Collector, appoint him to be receiver of such property

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ORDER XLI

Appeals from Original Decrees

Sec. 541 — Form of appeal. What to accompany memorandum.

1 (*1*) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the C[illegible] in this behalf [illegible] a copy of the decree appealed fro[illegible] penses therewith) of the judgment on which it is founded

(*2*) The memorandum shall set forth concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and such grounds shall be numbered consecutively

Contents of memorandum

Sec. 542 — Grounds which may be taken in appeal

2 The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be

confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground

Rejection or amendment of memorandum

3 (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there Sec 543

(2) Where the Court rejects any memorandum it shall record the reasons for such rejection

(3) Where a memorandum of appeal is amended the Judge, or such officer as he appoints in this behalf shall sign or initial the amendment

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.

4 Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be Sec 544

Stay of proceedings and of execution

Stay by Appellate Court

5 (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Appellate Court may for sufficient cause order stay of execution of such decree Sec 545

Stay by Court which passed the decree

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom the Court which passed the decree may on sufficient cause being shown order the execution to be stayed

(3) No order for stay of execution shall be made under sub rule (1) or sub rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made

(b) that the application has been made without unreasonable delay, and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

(4) Notwithstanding anything contained in sub rule (3) the Court may make an *ex parte* order for stay of execution pending the hearing of the application

Security in case of order for execution of decree appealed from

6 (1) Where an order is made for the execution of a decree from which an appeal is pending the Court which passed the decree shall, on sufficient cause being shown by the appellant require security to be taken for the res Sec 546

titution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall on the application of the judgment debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of

Sec 547 — No security to be required from the Government or a public officer in certain cases

7 No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit from any public officer sued in respect of an act alleged to be done by him in his official capacity

New — Exercise of powers in appeal from order made in execution of decree

8 The powers conferred by rules 5 and 6 shall be exerciseable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree

Procedure on admission of appeal

Sec 548 — Registry of memorandum of appeal Register of Appeals

9 (1) Where a memorandum of appeal is admitted the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation and shall register the appeal in a book to be kept for the purpose

(2) Such book shall be called the Register of appeals

Sec 549 — Appellate Court may require appellant to furnish security for costs

10 (1) The Appellate Court may in its discretion either before the respondent is called upon to appear and answer or afterwards on the application of the respondent demand from the appellant security for the costs of the appeal or of the original suit or of both

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates

Where appellant resides out of British India

(2) Where such security is not furnished within such time as the Court orders the Court shall reject the appeal

Sec 551 — Power to dismiss appeal without sending notice to Lower Court

11 (1) The Appellate Court, after sending for the record if it thinks fit so to do and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader

(2) If on the day fixed or on any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing the Court may make an order that the appeal be dismissed

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred

Day for hearing appeal

12 (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal Sec 552.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal so as to allow the respondent sufficient time to appear and answer the appeal on such day

Appellate Court to give notice to Court whose decree appealed from

13 (1) Where the appeal is not dismissed under rule 11 the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred Sec 550

Transmission of papers to Appellate Court

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court

Copies of exhibits in Court whose decree appealed from

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred specifying any of the papers in such Court of which he requires copies to be made and copies of such papers shall be made at the expense of, and given to the applicant

Publication and service of notice of day for hearing appeal

14 (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court house and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer, and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice Sec. 553

Appellate Court may itself cause notice to be served

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to

Contents of notice

15 The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte* Sec 554.

Procedure on hearing

Right to begin

16 (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal Sec 555

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply

Dismissal of appeal for Appellant's default

17 (1) Where on the day fixed, or on any any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing the Court may make an order that the appeal be dismissed Sec 556.

titution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security

(2) Where an order has been made for the sale of immoveable property in execution of a decree and an appeal is pending from such decree, the sale shall on the application of the judgment debtor to the Court which made the order be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of

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7 No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity

New — Exercise of powers in appeal from order made in execution of decree

8 The powers conferred by rules 5 and 6 shall be exerciseable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree

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Where appellant resides out of British India

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(2) If on the day fixed or on any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing the Court may make an order that the appeal be dismissed

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred

of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent

(4) Where in any case in which any respondent has under this rule filed a memorandum of objection the original appeal is withdrawn or is dismissed for default the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit

(5) The provisions relating to pauper appeals shall so far as they can be made applicable apply to an objection under this rule

Remand of case by Appellate Court

23 Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may if it thinks fit by order remand the case and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred with directions to re admit the suit under its original number in the register of civil suits and proceed to determine the suit and the evidence (if any) recorded during the original trial shall subject to all just exceptions be evidence during the trial after remand　Sec 562

Where evidence on record sufficient Appellate Court may determine case finally

24 Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment the Appel ... necessary, ... that the ... cree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds　Sec 565

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from

25 Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue or to determine any question of fact which appears to the Appellate Court essential to the right decision of the suit upon the merits the Appellate Court may if necessary frame issues and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required and such Court shall proceed to try such issues and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor　Sec 566

Findings and evidence to be put on record

Objections to finding

26 (1) Such evidence and findings shall form part of the record in the suit and either party may within a time to be fixed by the Appellate Court present a memorandum of objections to any finding　Sec 567

Determination of appeal

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal

Production of additional evidence in Appellate Court

27 ... ntitled ... docu　Sec 568

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined

(2) Wherever additional evidence is allowed to be produced by an Appellate Court the Court shall record the reason for its admission

Sec 569 — Mode of taking additional evidence

28 Wherever additional evidence is allowed to be produced the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred or any other subordinate Court to take such evidence and to send it when taken to the Appellate Court

Sec 570 — *Points to be defined and recorded*

29 Where additional evidence is directed or allowed to be taken the Appellate Court shall specify the points to which the evidence is to be confined and record on its proceedings the points so specified

Judgment in appeal

Sec 571 — Judgment when and where pronounced

30 The Appellate Court after hearing the parties or their pleaders and referring to any part of the proceedings whether on appeal or in the Court from whose decree the appeal is preferred to which reference may be considered necessary shall pronounce judgment in open Court either at once or on some future day of which notice shall be given to the parties or their pleaders

Sec 574 — Contents date and signature of judgment

31 The judgment of the Appellate Court shall be in writing and shall state—

(a) the points for determination

(b) the decision thereon,

(c) the reasons for the decision and

(d) where the decree appealed from is reversed or varied the relief to which the appellant is entitled

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein

Sec 577 — What judgment may direct

32 The judgment may be for confirming varying or reversing the decree from which the appeal is preferred or if the parties to the appeal agree as to the form which the decree in appeal shall take or as to the order to be made in appeal the Appellate Court may pass a decree or make an order accordingly

O 58 r 4 (E. R) — *Power of Court of Appeal*

33 The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and pass or make such further or other decree or order as the case may require and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection

Illustration

A claims a sum of money as due to him from X or Y and in a suit against both obtains a decree against X X appeals and A and Y are respondents The Appellate Court decides in favour of X It has power to pass a decree against Y

34 Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal and he may state his reasons for the same **Sec. 576.**

Dissent to be recorded

Decree in appeal

Date and contents of decree

35 (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced **Sec. 579.**

(2) The decree shall contain the number of the appeal the names and descriptions of the appellant and respondent and a clear specification of the relief granted or other adjudication made

(3) The decree shall also state the amount of costs incurred in the appeal and by whom or out of what property and in what proportions such costs and the costs in the suit are to be paid

(4) The decree shall be signed and dated by the Judge or Judges who passed it

Judge dissenting from judgment need not sign decree

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree

Copies of judgment and decree to be furnished to parties

36 Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense **Sec. 580.**

37 A copy of the judgment and of the decree certified by the Appellate Court or such officer as it appoints in this behalf shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit and an entry of the judgment of the Appellate Court shall be made in the register of civil suits **Sec. 581.**

Certified copy of decree to be sent to Court whose decree appealed from

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ORDER XLII

Appeals from Appellate Decrees

Procedure

1 The rules of Order XLI shall apply, so far as may be to appeals from Appellate decrees **New.**

ORDER XLIII

Appeals from Orders

Appeals from orders

1 An appeal shall lie from the following orders under the provisons of section 104 namely — **Sec. 588.**

(*a*) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court,

(*b*) an order under rule 10 of Order VIII pronouncing judgment against a party,

(*c*) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit,

(*d*) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*

(*e*) an order under rule 4 of Order X pronouncing judgment against a party,

(*f*) an order under rule 21 of Order XI,

(*g*) an order under rule 10 of Order XVI for the attachment of property,

(*h*) an order under rule 20 of Order XVI pronouncing judgment against a party,

(*i*) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement,

(*j*) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale,

(*k*) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit,

(*l*) an order under rule 10 of Order XXII giving or refusing to give leave,

(*m*) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction,

(*n*) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit,

(*o*) an order under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage-money,

(*p*) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV,

(*q*) an order under rule 2, rule 3 or rule 6 of Order XXXVIII,

(*r*) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX,

(*s*) an order under rule 1 or rule 4 of Order XL,

(*t*) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal,

(*u*) an order under rule 23 of Order XLI remanding a case where an appeal would lie from the decree of the Appellate Court;

(*v*) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV;

(*w*) an order under rule 4 of Order XLVII granting an application for review.

Procedure

2 The rules of Order XLI shall apply so far as may be, to appeals from orders **Sec. 590.**

ORDER XLIV

Pauper Appeals

Who may appeal as pauper

1 Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal and may be allowed to appeal as a pauper, subject in all matters including the presentation of such application to the provisions relating to suits by paupers, in so far as those provisions are applicable **Sec. 592.**

Procedure on application for admission of appeal

Provided that the Court shall reject the application unless upon a perusal thereof and of the judgment and decree appealed from it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust

Inquiry into pauperism

2 The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court from whose decision the appeal is preferred **Sec. 593.**

d to sue or appeal as a pauper
preferred no further inquiry
unless the Appellate Court

ORDER XLV

Appeals to the King in Council

"Decree" defined

1 In this Order unless there is something repugnant in the subject or context the expression "decree" shall include a final order **Sec. 594.**

Application to Court whose decree complained of

2 Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of **Sec. 598.**

Certificate as to value or fitness

3 (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council **Sec. 600.**

(2) Upon receipt of such petition the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted

Consolidation of suits.

4 For the purposes of pecuniary valuation suits involving substantially the same questions for determination and decided by the same judgment may be consolidated but suits decided by separate judgments shall not be consoli- **New.**

dated, notwithstanding that they involve substantially the same questions for determination.

New. Remission of dispute to Court of first instance

5 In the event of any dispute arising between the parties as to the amount or value of the subject matter of the suit in the Court of first instance, or as to the amount or value of the subject matter in dispute on appeal to His Majesty in Council the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit refer such dispute for report to the Court of first instance which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made

Sec. 601. Effect of refusal of certificate

6 Where such certificate is refused, the petition shall be dismissed

Sec. 602. Security and deposit required on grant of certificate

7 (1) Where the certificate is granted the applicant shall, within six months from the date of the decree complained of or within six weeks from the date of the grant of the certificate whichever is the later date,—

(a) furnish security for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being,

(2) papers which the parties agree to exclude,

(3) accounts or portions of accounts which the officer empowered by the Court for that purpose considers unnecessary and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may direct to be excluded

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid he shall also within the time mentioned in sub rule (1), deposit the amount required to defray the expense of printing such copy

Sec. 603. Admission of appeal and procedure thereon

8 Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

(a) declare the appeal admitted

(b) give notice thereof to the respondent,

(c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and

(d) . . . of the

Sec. 604. Revocation of acceptance of security

9 At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon

Power to order further security or payment

10 Where at any time after the admission of an appeal but before the transmission of the copy of the record except as aforesaid to His Majesty in Council such security appears inadequate **Sec. 605.**

or further payment is required for the purpose of translating transcribing printing indexing or transmitting the copy of the record except as aforesaid

the Court may order the appellant to furnish within a time to be fixed by the Court other and sufficient security or to make within like time the required payment

Effect of failure to comply with order

11 Where the appellant fails to comply with such order the proceedings shall be stayed **Sec. 606**

and the appeal shall not proceed without an order in this behalf of His Majesty in Council

and in the meantime execution of the decree appealed from shall not be stayed

Refund of balance deposit

12 When the copy of the record except as aforesaid has been transmitted to His Majesty in Council the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7 **Sec. 607.**

Powers of Court pending appeal

13 (1) Notwithstanding the grant of a certificate for the admission of any appeal the decree appealed from shall be unconditionally executed unless the Court otherwise directs **Sec. 608.**

(2) The Court may if it thinks fit on special cause shown by any party interested in the suit or otherwise appearing to the Court —

(*a*) impound any moveable property in dispute or any part thereof or

(*b*) allow the decree appealed from to be executed taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal or

(*c*) stay the execution of the decree appealed from taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from or of any order which His Majesty in Council may make on the appeal or

(*d*) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject matter of the appeal as it thinks fit by the appointment of a receiver or otherwise

Increase of security found inadequate

14 (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate the Court may on the application of the other party require further security **Sec. 609.**

(2) In default of such further security being furnished as required by the Court —

(*a*) if the original security was furnished by the appellant the Court may on the application of the respondent execute the decree appealed from as if the appellant had furnished no such security,

(*b*) if the original security was furnished by the respondent the Court shall so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit

Sec. 610. 15 (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred

Procedure to enforce orders of King in Council

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same and the Court to which the said order is so transmitted shall execute it accordingly in the manner and according to the provisions applicable to the execution of its original decrees

(3) When any monies expressed to be payable in British currency are payable in India under such order the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty s Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments

Sec. 611. 16 The orders made by the Court which executes the order of His Majesty in Council relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees

Appeal from order relating to execution

ORDER XLVI

Reference

Sec. 617. 1. Where before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree any question of law or usage having the force of law arises on which the Court trying the suit or appeal, or executing the decree entertains reasonable doubt the Court may either of its own motion or on the application of any of the parties draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court

Reference of question to High Court

Sec. 618. 2 The Court may either stay the proceedings or proceed in the case notwithstanding such reference and may pass a decree or make an order contingent upon the decision of the High Court on the point referred,

Court may pass decree contingent upon decision of High Court

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference

Judgment of High Court to be transmitted and case disposed of accordingly

3 The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made, and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court **Sec. 619.**

Costs of reference to High Court

4 The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case. **Sec. 620.**

Power to alter, etc, decree of Court making reference

5 Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment and may alter cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose and make such order as it thinks fit **Sec. 621.**

Power to refer to High Court questions as to jurisdiction in small causes

6 (1) Where at any time before judgment a Court in which a suit has been instituted doubts **Sec. 646A.**
Small
mit the
record to the High as to
the nature of the suit

(2) On receiving the record and statement the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes

7 (1) Where it appears to a District Court that a Court subordinate thereto has by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law or exercised a jurisdiction not so vested the District Court may and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous **Sec. 646B.**

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule the High Court may make such order as in the circumstance appears to it to be just and proper

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule

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ORDER XLVII

Review

Application for review of judgment

1 (1) Any person considering himself aggrieved— **Sec. 623.**

(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred

(*b*) by a decree or order from which no appeal is allowed, or

(*c*) by a decision on a reference from a Court of Small Causes,

and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree passed or order made against him may apply for a review of judgment to the Court which passed the decree or made the order

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when being respondent he can present to the Appellate Court the case on which he applies for the review

Sec 624

To whom applications for review may be made

2 An application for review of a decree or order of a Court not being a High Court upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree shall be made only to the Judge who passed the decree or made the order sought to be reviewed but any such application may if the Judge who passed the decree or made the order has ordered notice to issue under rule 4 sub rule (2) proviso (*a*) be disposed of by his successor

Sec 625

Form of applications for review

3 The provisions as to the form of preferring appeals shall apply *mutatis mutandis* to applications for review

Sec 626

Application where rejected

4 (1) Where it appears to the Court that there is not sufficient ground for a review it shall reject the application

Application where granted

(2) Where the Court is of opinion that the application for review should be granted it shall grant the same

Provided that—

(*a*) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for and

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation

Sec 627

Application for review in Court consisting of two or more Judges

5 Where the Judge or Judges, or any one of the Judges who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers

such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same

Application where rejected

6 (1) Where the application for a review is heard by more than one Judge and the Court is equally divided the application shall be rejected Sec 628

(2) Where there is a majority the decision shall be according to the opinion of the majority

Order of rejection not appealable Objections to order granting application

7 (1) An order of the Court rejecting the application shall not be appealable but an order granting an application may be objected to on the ground that the application was— Sec 629

(a) in contravention of the provisions of rule 2

(b) in contravention of the provisions of rule 4 or

(c after the expiration of the period of limitation prescribed therefor and without sufficient cause

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit

(2) Where the application has been rejected in consequence of the [illegible] may apply for an order to have the [illegible] file and where it is proved to the satis[illegible] [illegible]revented by any sufficient cause from appearing when such application was called on for hearing the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same

(3) No order shall be made under sub rule (2) unless notice of the application has been served on the opposite party

Registry of application granted and order for re hearing

8 When an application for review is granted a note thereof shall be made in the register and the Court may at once re hear the case or make such order in regard to the re hearing as it thinks fit Sec 630

Bar of certain application

9 No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained Sec 629, last para

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ORDER XLVIII

Miscellaneous

Process to be served at expense of party issuing

1 (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued unless the Court otherwise directs Sec. 93

(2) The court fee chargeable for such service shall be paid within a time to be fixed before the process is issued

Costs of service

Orders and notices how served

2 All orders notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons Sec 94

Sec 644

Use of forms in appendices

3 The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned

ORDER XLIX.

Chartered High Courts

Sec 636

Who may serve processes of High Court

1 Notice to produce documents, summonses to witnesses, and every other judicial process issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs

New

Saving in respect of Chartered High Courts

2 Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

Sec 638

Application of rules

3 The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely —

(1) rule 10 and rule 11, clauses (*b*) and (*c*), of Order VII,

(2) rule 3 of Order X,

(3) rule 2 of Order XVI,

(4) rules 5, 6, 8, 9 10, 11, 13, 14, 15 and 16 so far as relates to the manner of taking evidence of Order XVIII,

(5) rules 1 to 8 of Order XX, and

(6) rules 7 of Order XXXIII (so far as relates to the making of a memorandum),

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

ORDER L.

Provincial Small Cause Courts

New

Provincial Small Cause Courts

1 The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts Act, IX of 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say —

(*a*) so much of this schedule as relates to—

(*i*) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits,

(ii) the execution of decrees against immoveable property or the interest of a partner in partnership property,

(iii) the settlement of issues, and

(b) the following rules and orders —

Order II r 1 (frame of suit),

Order X, r 3 (record of examination of parties),

Order XV, except so much of rule 4 as provides for the pronouncement, at once of judgment,

Order XVIII, rules 5 to 12 (evidence),

Orders XLI to XLV (appeals),

Order XLVII, rules 2, 3, 5, 6, 7 (review),

Order LI

ORDER LI

Presidency Small Cause Courts

Presidency Small Cause Courts

1 Save as provided in rules 22 and 23 of Order V rules 4 and 7 of Order XXI, and rule 4 of Order XXVI and by the Presidency Small Cause Court, Act XV of 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay * New

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* The Appendix will be found in the Second Volume in its proper place

THE SECOND SCHEDULE.

ARBITRATION

Arbitration in suits

Parties to suit may apply for order of reference

1 (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference **Sec. 506.**

(2) Every such application shall be in writing and shall state the matter sought to be referred

Appointment of arbitrator

2 The arbitrator shall be appointed in such manner as may be agreed upon between the parties **Sec. 507.**

Order of reference

3 (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order **Sec. 508.**

(2) Where a matter is referred to arbitration the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit

Where reference is to two or more order to provide for difference of opinion

4 (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators— **Sec. 509.**

(*a*) by the appointment of an umpire , or

(*b*) by declaring that , if the majority of the arbitrators agree, the decision of the majority shall prevail , or

(*c*) by empowering the arbitrators to appoint an umpire , or

(*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act

Power of Court to appoint arbitrator in certain cases

5 (1) In any of the following cases, namely — **Sec. 510**

(*a*) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or **Sec. 507 (2)**

(*b*) where an arbitrator or umpire—

(*i*) dies, or

(*ii*) refuses or neglects to act or becomes incapable of acting, or **Sec. 514,**

(*iii*) leaves British India in circumstances showing that he will probably not return at an early date, or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision, or

(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission **New.**

13 The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them **Sec. 519.**

Order as to costs of arbitration

Where award or matter referred to arbitration may be remitted

14 The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,— **Sec. 520.**

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred,

(*b*) where the award is so indefinite as to be incapable of execution,

(*c*) where an objection to the legality of the award is apparent upon the face of it

Grounds for setting *aside award*

15 (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it But no award shall be set aside except on one of the following grounds, namely — **Sec. 521.**

(*a*) corruption or misconduct of the arbitrator or umpire

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed or of *wilfully* misleading or deceiving the arbitrator or umpire

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid

(2) Where an award becomes void or is set aside under clause (1) the Court shall make an order superseding the arbitration and in such case shall proceed with the suit

16 (1) Where the Court sees no cause to remit the award or any of the [illegible] for reconsideration [illegible] **Sec. 522.**

(2) *Upon the judgment so pronounced a decree shall follow, and no appeal* shall lie from such dec[illegible] far as the decree is in excess of or not in accordance with, th[illegible]

Order [illegible] *e on agreements to refer*

17 (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court **Sec. 523.**

Application to file in Court agreement to refer to arbitration

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision, or

(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission. **New.**

13 [illegible] **Sec. 519.**

Order as arbitration

Where award or matter referred to arbitration may be remitted

14 The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire upon such terms as it thinks fit,— **Sec. 520.**

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred,

(*b*) where the award is so indefinite as to be incapable of execution,

(*c*) where an objection to the legality of the award is apparent upon the face of it.

Grounds for setting aside award

15 (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely — **Sec. 521.**

(*a*) corruption or misconduct of the arbitrator or umpire

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator or umpire

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(2) Where an award becomes void or is set aside under clause (1) the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

Judgment to be according to award

16 (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award. **Sec. 522.**

[illegible] no appeal [illegible]

Order of reference on agreements to refer

Application to file in Court agreement to refer to arbitration

17 (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court **Sec. 523.**

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS

Powers of Collector

1 Where the execution of a decree has been transferred to the Collector under section 68, he may **Sec. 321.**

(*a*) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment debtor to raise the amount of the decree , or

(*b*) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold , or

(*c*) sell the property ordered to be sold or so much thereof as may be necessary

Procedure of Collector in special cases

2 Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ... transferred, the Collector, ... ason to believe that all the ... without a sale of the whole ... hereinafter provided **Sec. 322.**

Notice to be given to decree holders and to persons having claims on property

3 (1) In an ... ch case as ... refe... **Sec. 322 A.**

(*a*) every person holding a decree for the payment of money against the judgment debtor capable of execution by sale of his immoveable property and which such decree holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable there under ,

(*b*) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced

(2) Such notice shall be published by being affixed on a conspicuous part of the court house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit , and where the address of any such decree holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise

Amount of decree for payment of money to be ascertained, and immoveable property available for their satisfaction

4. (1) Upon the expiration of the said period, the Collector shall appoint ... nature and extent of such decrees and claims and of the judgment debtor's immoveable property, and may, *from* time to time, adjourn such hearing and inquiry **Sec. 322 B.**

THE FOURTH SCHEDULE.

(See section 155)

ENACTMENTS AMENDED

1	2	3	4
Year	No	Short title	Amendment
18 0	*VII*	The Court fees Act 18 0	*In article 1 of Schedule I after the word* plaint the words written statement pleading a set off or counter claim and after the word Act the words or of cross objection shall be inserted
			From article 11 of Schedule II the word from an order rejecting a plaint or shall be omitted
			For the entry in the first column of Schedule relating to article 19 the following substituted namely —

e of the property to such as the Court thinks fit and

(*b*) where the Collector has proceeded under paragraph 1 of the original decree in execution of which the Court ordered the sale of immoveable property or otherwise as the Court may under section 73 direct or

(*c*) where the Collector has proceeded under paragraph 2

(*i*) in keeping down the interest on incumbrances on the property

( ) where the judgment debtor has no other sufficient means of subsistence in providing for his subsistence to such amount as the Court thinks fit and

(*iii*) in discharging rateably the claims of the original decree holder and any other decree holders who have complied with the said notice and whose claims were included in the amount ordered to be recovered

(4) No other holde to be paid out of such p obtained such order h to the judgment debtor

10 Where the Collector sells any property under this schedule he shall put it up to public auction in one or as he thinks fit and may **Sec 325**

Sales how to be conducted

(*a*) fix a reasonable reserved price for each lot,

(*b*) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property,

(*c*) buy in the property offered for sale, and re sell the same by public auction or private contract, as he thinks fit

Sec. 325 A.

Restrictions as to alienation by judgment debtor or his representative, and prosecution of remedies by decree holders

11 (*1*) So long as the Collector can exercise or perform in respect of the judgment debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money

(*2*) During the same period no Civil Court shall issue any process of execution either against the judgment debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree holder has been temporarily deprived

Sec. 325 B.

Provision where property is in several districts

12 Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct

Sec. 325 C.

Powers of Collector to compel attendance and production

13 In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents

THE FOURTH SCHEDULE.

(See section 155.)

ENACTMENTS AMENDED.

1	2	3	4
Year	No	Short title	Amendment
1870	VII	The Court fees Act 1870	In article 1 of Schedule I after the word plaint the words written statement pleading a set off or counter claim and after the word Act the words or of cross objection shall be inserted From article 11 of Schedule II the words from an order rejecting a plaint or shall be omitted For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted namely — Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure 1908

THE FIFTH SCHEDULE.

(See section 156)

ENACTMENTS REPEALED

1	2	3	4
Year	No	Subject or short title	Extent of repeal
		Acts of Governor General in Council	
1870	VII	The Court fees Act, 1870	Section 16 and article 15 of Schedule II
1882	IV	The Transfer of Property Act 1882	[illegible]
„	XIV	The Code of Civil Procedure	
„	XV	The Presidency Small Cause Courts Act, 1882	The last paragraph of section 3
1888	VI	The Debtors Act, 1888	Sections 2 to 8
„	VII	The Civil Procedure Code Amendment Act 1888	So much as is unrepealed except section 1 section 65 and section 66 sub sections (1), (2) and (4)
„	X	The Presidency Small Cause Courts Law Amendment Act 1888	So much as is unrepealed
1890	VIII	The Guardian and Wards Act 1890	Section 53
1891	XII	The Repealing and Amending Act, 1891	So much as relates to Act XIV of 1882 and Act VII of 1888
1892	VI	The Indian Limitation Act and Civil Procedure Code Amendment Act 1892	In the title and preamble the words and the Code of Civil Procedure" and sections 2 3 and 4
1894	V	The Civil Procedure Code Amendment Act 1894	The whole Act
1895	VII	The Punjab Laws Act Amendment Act 1895	Sections 1 and 2
„	XIII	The Civil Procedure Code Amendment Act, 1895.	The whole Act
1900	VI	The Lower Burma Courts Act, 1900	So much of the schedules as relate to Act XIV of 1882

TABLE OF CASES CITED.

W

THE

CODE OF CIVIL PROCEDURE.[1]

ACT NO. V OF 1908.

Passed by the Governor-General of India in Council.

Received the assent of the Governor-General on the 21st March, 1908.

AN ACT

TO

Consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature, it is hereby enacted as follows —

PRELIMINARY.

Short title commencement and extent

1 (*1*) This Act may be cited as the Code of Civil Procedure 1908

(*2*) It shall come into force on the first day of January, 1909,

(*3*) This section and sections 155 to 158 extend to the whole of British India the rest of the Code extends to the whole of British India except the Scheduled Districts

As to the application of this Code to Provincial and to Presidency Small Cause Courts, see Sections 7 and 8 and notes thereto

[1] Ar

For power to modify the Code in its application to suits between landlords and tenants in Bengal where the Bengal Tenancy Act is in force or comes into operation, see Act VIII of 1885 s 143 —*Note, Legislative Department*

THE
CODE OF CIVIL PROCEDURE.[1]

ACT NO. V OF 1908.

Passed by the Governor-General of India in Council.

Received the assent of the Governor-General on the 21st March, 1908.

AN ACT

TO

Consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature, it is hereby enacted as follows —

PRELIMINARY.

Short title commencement and extent

1 (*1*) This Act may be cited as the Code of Civil Procedure 1908

(*2*) It shall come into force on the first day of January, 1909,

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As to the application of this Code to Provincial and to Presidency Small Cause Courts, see Sections 7 and 8 and notes thereto

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[1] Any provisions of this Code may by rule made under s 19 of the Central Provinces Land Revenue Act (XVIII of 1881) be applied to all or any classes of cases before Revenue officers in the Central Provinces For similar power in the Punjab see the Punjab Tenancy Act (XVI of 1887), s 88

For power to modify the Code in its application to suits between landlords and tenants in Bengal, where the Bengal Tenancy Act is in force, or comes into operation, see Act VIII of 1885, s 143 —*Note Legislative Department*

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CODE OF CIVIL PROCEDURE.[1]

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As to the application of this Code to Provincial and to Presidency Small Cause Courts see Sections 7 and 8 and notes thereto

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British India —Briti[illegible] Ind[illegible] defined in the General Clauses Act, (X of 1897 [illegible] domini ons [illegible] overnor Gene[illegible] to the Gove[illegible] n 1891 (II of 1891) s 2} but not Singapore (Straits Settlement Act, 1866 s 1) Any newly acquired province becomes on its annexation part of British India[1] but retains its own law until altered by the Crown or the Legislature[2] The Cantonment of Wadhwan in Kathiwar is within the limits of British India[3] The Cantonment of Secunderabad is one of British India[4] The Tributary Mahals of Orissa do not form part of British India[5]

Scheduled Districts —The Scheduled districts are enumerated in the *First Schedule to the Scheduled Districts Act, (XIV of 1874)*

Santal Parganas —In the Santal Parganas, which is one of the scheduled districts of Bengal the Code of Civil Procedure applies to suits exceeding Rs [illegible] in the Courts established

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Execution of decrees passed in Scheduled districts —Decrees obtained in scheduled districts cannot be executed by Courts in British India unless and until under the provisions of s 5 of the Scheduled Districts Act (XIV of 1874) the Government has issued the notification therein referred to applying to the scheduled districts such portion of the Code of Civil Procedure as they think proper to apply[8]

Scheduled Districts in which Code is in force —The following statement of the Scheduled Districts in which the Code is in force has been prepared by the Legislative Department, Government of India

I —The whole Code (except ss 1 and 3[9] has been extended under s 5 of the Scheduled Districts Act, (XIV of 1874), to the following Scheduled Districts —

Sindh	See Gazette of India 1882, Part I, page 217
The Districts of Darjiling and Jalpaiguri (called in Act XIV of 1874 the Darjiling and Jalpaiguri Divisions)	Ditto ditto page 21[illegible]
The Districts of Hazaribagh Lohardaga[10] (including at this time the District of Palamau which was separated in 1894) and Manbhum the Pargana of Dhalbhum in the District of Singhbhum, and the Mahal of Angul	Ditto, ditto, ditto

[1] Ousely v Plowden, 1 Boulnois 161
[2]
[3]
[4]
[5]
[6]

[illegible] heduled districts which are not de regulationised
[illegible] called the Ranchi district, see Calcutta Gazette, 1899 Pt I, p 44

The Pargana Jaunsar Bawar in the Dehra Dun District and the scheduled portion of the Mirzapur District	See Gazette of India, 1882, Part I, page 217.
The Scheduled Districts of the Punjab . ..	Ditto, ditto, page 219
Coorg	Ditto, ditto, page 217.
The Districts of Kamrup, Nowgong, Darrang, Sibsagar, Lakhimpur, Goalpara, (excluding the Eastern Duars), Sylhet, Cachar (excluding the North Cachar Hills)	Ditto, ditto, page 218
The territory transferred from Upper Burma to Lower Burma by Notifications No 110, dated 24th February, 1887, and No 341, dated 13th August, 1887	Ditto, 1887, Part I, pages 123, and 429, respectively.
Ajmere and Merwara	Ditto, 1882 Part I, page 289.
The Scheduled Districts of the Central Provinces (except Ss. 1 and 3 and so much of the Code as authorizes the sale of immoveable property in execution of a decree, not being a decree directing the sale of such property . ..	Ditto, ditto, page 217

'he whole Code has been extended to the Municipality of Chaibassa in the .bhum district—see Gazette of India, 1896, Pt I, p 44.

.o much of the whole Code as has not been repealed has been declared in under s 3 *(a)* of the Scheduled Districts Act, 1874, (XIV of 1874) in the iat Estate in the Singhbhum district—see Gazette of India, 1897, Pt I, 59

'he whole Code has been extended under ss 5 and 5A of the Scheduled icts Act, 1874 (XIV of 1874), to the Kumaon Division (corresponding to the luled Districts of Kumaon and Gurhwal and the Tarai Parganas)—see tte of India, 1895, Pt I, p 573

I —The Code was withdrawn from the Dibrugarh Frontier Tract in mpur and the Mikir Hill Tract in Nowgong, see notifications in Assam e, Part II, 1884, pages 212 and 705, respectively Ss 223 to 228 have however, been again extended to these tracts, See Note III below

II —Ss 223 to 228 of the old Code have been extended under s 5 of the luled Districts Act, (XIV of 1874), to the following Scheduled Districts, ly —

The Kolhan in the District of Singhbhum	Gazette of India, 1889, Part I, page 15.
The whole of Upper Burma, except the town of Mandalay (in which they were already in force) and the Shan States	Ditto, ditto, page 13.
The Hill Tracts of Arakan	Ditto, ditto, page 450.
The Districts of the Garo, Khasi and Jaintia and Naga Hills, the Eastern Duars in Goalpara the North Cachar Hills in Cachar, the Mikir Hill Tract in Nowgong and the Dibrugarh Frontier Tract in Lakhimpur	Ditto, 1888 ditto, page 546.

British India —British India is defined in the General Clauses Act, (X of 1897) s 2 (7) ... ritories and places within His Majesty's dom... overned ... Governo ... include ... apore (... newly acquired province becomes on its a... retains its own law until altered by the Crown or the Legislature[1] ... Cantonment of Wadhwan in Kathiwar is within the limits of British India[3] The Cantonment of Secunderabad is one of British India[4] The Tributary Mahals of Orissa do not form part of British India[5]

Scheduled Districts —The Scheduled districts are enumerated in the First Schedule to the Scheduled Districts Act, (XIV of 1874)

Santal Parganas —In the Santal Parganas, which is one of the scheduled districts of Bengal, the Code of Civil Procedure applies to suits exceeding Rs 1,000 in value, provided that such suits are tried in the Courts established under the Civil Courts Act, XII of 1887[6]

Bhutan Duars —The notification extending the Code of Civil Procedure to Jalpaiguri had not the effect of introducing the Code of Civil Procedure into the Bhutan Duars, although the latter are a part of Jalpaiguri, inasmuch as Act XVI of 1869 which was then in force in the Bhutan Duars, excluded that jurisdiction in express terms But the effect of the repeal of Act XVI (without any qualification) by Act VII of 1895, B C, has left the Code of Civil Procedure to be administered in the Bhutan Duars[7]

Execution of decrees passed in Scheduled districts —Decrees obtained in scheduled districts cannot be executed by Courts in British India, unless and until under the provisions of s 5 of the Scheduled Districts Act, (XIV of 1874) the Government has issued the notification therein referred to, applying to the scheduled districts such portion of the Code of Civil Procedure as they think proper to apply[8]

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The Districts of Darjiling and Jalpaiguri (called in Act XIV of 1874 the Darjiling and Jalpaiguri Divisions)	Ditto, ditto, page 21
The Districts of Hazaribagh, Lohardaga[10] (including at this time the District of Palamau which was separated in 1891) and Manbhum, the Pargana of Dhalbhum in the District of Singhbhum, and the Mahal of Angul	Ditto, ditto, ditto

[1] Ousely v Plowden, 1 Boulnois, 161
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The Pargana Jaunsar Bawar in the Dehra Dun District and the scheduled portion of the Mirzapur District	See Gazette of India, 1882, Part I, page 217
The Scheduled Districts of the Punjab	Ditto, ditto, page 219
Coorg	Ditto ditto, page 217.
The Districts of Kamrup Nowgong Darrang, Sibsagar Lakhimpur Goalpara (excluding the Eastern Duars), Sylhet, Cachar (excluding the North Cachar Hills)	Ditto, ditto, page 218
The territory transferred from Upper Burma to Lower Burma by Notifications No 110 dated 24th February 1887, and No 1341, dated 13th August, 1887	Ditto, 1887, Part I, pages 123, and 429, respectively.
Ajmere and Merwara	Ditto, 1882 Part I, page 283.
The Scheduled Districts of the Central Provinces (except Ss 1 and 3 and so much of the Code as authorizes the sale of immoveable property in execution of a decree, not being a decree directing the sale of such property	Ditto, ditto, page 217

The whole Code has been extended to the Municipality of Chaibassa in the ghbhum district—see Gazette of India, 1896, Pt I, p 44

So much of the whole Code as has not been repealed has been declared in e under s 3 (*a*) of the Scheduled Districts Act, 1874, (XIV of 1874) in the abat Estate in the Singhbhum district—see Gazette of India, 1897, Pt I, 1059

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NII —The Code was withdrawn from the Dibrugarh Frontier Tract in mpur and the Mikir Hill Tract in Nowgong, see notifications in Assam e, Part II, 1884, pages 212 and 705, respectively Ss 223 to 228 have however, been again extended to these tracts, See Note III below

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The whole of Upper Burma, except the town of Mandalay (in which they were already in force) and the Shan States	Ditto, ditto, page 13.
The Hill Tracts of Arakan	Ditto, ditto, page 450.
The Districts of the Garo, Khasi and Jaintia and Naga Hills, the Eastern Duars in Goalpara, the North Cachar Hills in Cachar, the Mikir Hill Tract in Nowgong and the Dibrugarh Frontier Tract in Lakhimpur	Ditto, 1[illegible]

The Mokokchung Sub-division of the Naga Hill District	Gazette of India 1891 Part I page 252		
Ss 223 to 225 as amended by Act VII of 1888 have been extended under s of the same Act to all the Scheduled Districts of Madras	Ditto	1889	ditto page 1

IV —The Debtors Act 1886 (VI of 1886) has been declared in force ... 3 (1) of the Scheduled Districts Act 1874 (XIV of 1874) in the sch... tricts in Ganjam and Vizagapatam see Gazette of India 1898 Pt 1, p ...

So much of the Civil Procedure Code Amendment Act 1888 (VII of ...) amends the Code has been extended under the same section to the follo... heduled Districts namely —

Sindh	Gazette of India 1888 Part I, page 478			
The Districts of Darjiling and Jalpaiguri	Ditto		ditto	page
The Districts of Hazaribagh Lohardaga[1] including at this time the District of Palamau which was separated in 1894) and Manbhum the Pargana of Dhalbhum in the District of Singhbhum, and the Mahal of Angul	Ditto		ditto	page 5
Coorg	Ditto		ditto,	page 409
The Scheduled Districts of the Central Provinces	Ditto		ditto	page 408
The Andaman and Nicobar Islands	Ditto		ditto,	page
The Town of Mandalay	Ditto		ditto,	page 37
The Pargana of Jaunsar Bawar in the Dehra Dun District and the scheduled portion of the Mirzapur District	Ditto,		ditto,	page 4
The Districts of Kamrup Nowgong (excluding the Mikir Hill Tract) Darrang, Sibsagar, Lakhimpur (excluding the Dibrugarh Frontier Tract), Goalpara (excluding the Eastern Duars), Sylhet and Cachar (excluding the North Cachar Hills)	Ditto,		ditto,	page 478
The Scheduled Districts of the Punjab	Ditto,	1889	do	page 299
Ajmere and Merwara	Ditto,		do	page 22

As to the extension of part of Act VII of 1888 to the Scheduled District ... ladras, see Note III, *supra*

V —Ss 1 and 3 of the Presidency Small Cause Courts Law Amendm... ct, (X of 1888) have been extended under s 5 of the Scheduled Dist... ct, (XIV of 1874), to the following Scheduled Districts, namely —

The Districts of Darjiling, Jalpaiguri, Hazaribagh Lohardaga (including at this time the District of Palamau which was separated in 1894) and Manbhum, the Pargana of Dhalbhum, in the District of Singhbhum, and the Mahal of Angul (see also Note VI, *infra* as to Angul)	Gazette of India, 1888, Part I, page 538

[1] Now called the Ranchi district, see Calc Gazette, Pt I, p 44

The Schedule l D strict of the Punjab	Gazette of India, 1880	Part I,	page 299
Coorg	Ditto,	do	page 290
Ajmere and Merwara	Ditto,	Part II,	page 220
The Scheduled Districts of the Central Provinces	Ditto,	Part I,	page 292
The Andaman and Nicobar Islands	Ditto	do	page 40
The Town of Mandalay (see also note VI infra)	Ditto	do	page 20
The Pargana of Jaunsar Bawar in the Dehra Dun District *and the scheduled portion of* the Mirzapur District	Ditto	do	page 3
The Districts of Kamrup Nowgong (excluding the Mikir Hill Tract) Darrang Sibsagar Lakhimpur (excluding the Dibrugarh Frontier Tract) Goalpara (excluding the Eastern Duars Sylhet and Cachar (excluding the North Cachar Hills)	Ditto	do	page 292
Sindh	Ditto	do	page 89

S 5 of the old Code and ss 1 and 4 of Act X of 1888 have been extended under s 5 of the Scheduled Districts Act, 1874 (XIV of 1874) to the Kolhan *in the District of Singhbhum see Gazette of India, 1889 Part I* page 538 S 4 of the Act has been extended to the Districts of Darjiling Jalpaiguri, Hazaribagh Lohardaga[1] (including at this time the Palamau district which was separated in 1894) Manbhum and Pargana Dhalbhum in the Singhbhum District —See Gazette of India, 1889 Pt I p 538

VI —In addition to the above extensions under the Scheduled Districts Act, the Code is, by virtue of special enactments and s 3 of the Code, in force in the following Scheduled Districts —

Aden and Perim[2] (subject to modifications)—by the Civil and Criminal Justice Aden Act (II of 1864) s 16 see Bombay Code, Vol I Ed *1894*

the Andaman and Nicobar Islands (with certain modifications noted *supra* by s 14 of the Andaman and Nicobar Islands Regulations (III of 1876) *(as amended by Reg I of 1884 s 4)*—See Gazette of India, 1884 Pt I p 15

The whole Code as amended by subsequent enactments has, subject to the provisions of the Upper Burmah Civil Courts Regulation (I of 1896), been extended to Upper Burmah (except the Shan States —See s 6 of the Regulation, and the First Schedule to the Burma Laws Act, (XIII of 1898)

So much of the whole Code as was in force in British India generally on the 1st February 1894 was declared in force in the Angul District by the Angul District Regulation (I of 1894)

Ss 273 to 328 of the old Code have been extended to the Santhal Parganas—See s 3 and Schedule of the Santhal Parganas Justice and Laws Regulation, (III of 1899)

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[1] Now called the Ranchi District see Calc Gazette pt I p 44
[2] Act II of 1864 has been extended to Perim under the Scheduled Dis (XIV of 1874) by notification No 832—Gazette of India 1886 Pt I p 86

VIII—The Code has been extended to the District of Coorg under s 5 of the Scheduled Districts Act, (XIV of 1874)—see Gazette of India, 1899, *Pt II, p* 1317

IX—Chap XX (ss 344 to 360 A) does not apply to Rangoon. See s. 8 (3) of Act VI of 1900

Interpretation of Acts—A Code must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered[1] The proper course in dealing with an Act intended to codify a particular branch of law is, in the first place to examine the language of the statute and to ask what is the natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood The purpose of such a statute surely was, that on any point *specifically* dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, roaming over a vast number of authorities in order to discover what he law was, extracting it by a minute critical examination of prior decisions[2]

The Statement of Objects and Reasons attached to a Bill or the report of a Select Committee or the debates of the Legislature cannot be referred to in the interpretation of the Act, the Statute itself can alone be looked to[3].

Marginal Notes Marginal Notes are not part of an enactment and cannot be referred to for the purpose of construing it[4]

Headings form an important part of the Act, and may be referred to in construing the sections to which they refer[5]

Definitions

2 In this Act, unless there is anything repugnant in the subject or context,—

(*1*) "Code" includes rules:

This definition covers the variable Orders and Rules in Schedule I of the Act For the effect of these rules and the power to vary the same, see Part X post

(*2*) "Decree" means the formal expression of an *adjudication which, so far as regards the Court expressing* it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144 but shall not include—

[1] Norendranath Sircar v. Kamalbasini (1896) L. R. 23 I. A 18.

[2] Ibid; Lord Macnaghten citing observations of Lord Herschell in B of England v Vaglian Bros (1891) A C 107

[3] [illegible] Gopal Krishna v. Sak[illegible] [illegible] of Bengal v. Prem [illegible]

[4] Dakhi Mullah v. Halway (1896) 23 Calc., 65 foll. in Punardeo N. Singh Ram Sarup Roy (1898) 25 Calc, 858; and see Balraj Kunwar v. Jag Singh, (1882) 8 Calc W N, 699

[5] Maxwell on Statutes 65 Eastern Counties Co. v Marriage, 9 H. L. C, 14 in Ali and Woodroffe Ev. notes to Preamble.

(*a*) any adjudication from which an appeal lies as an appeal from an order, or

(*b*) any order of dismissal for default

Explanation —A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of It is final when such adjudication completely disposes of the suit It may be partly preliminary and partly final

Decree —Since the right of appeal is to some extent determined by reference to this definition, its importance is considerable, *See Part VII Post* In considering the right of appeal however, and the effect of this definition, the remarks of the Privy Council in Meenakshi *v* Subramaniya[1] may be recalled "It must not be assumed that there is a right of appeal in every matter that comes under the consideration of a Judge, such a right must be given by statute or by some authority equivalent to a statute

Questions of difficulty have constantly arisen and will no doubt continue to arise in distinguishing between decrees and orders an order being defined as "the formal expression of any decision of a Civil Court which is not a decree"[2]

Preliminary and Final The principal modification in this definition as existing in Act XIV of 1882 consists in the distinction now drawn between preliminary and Final decrees, which recognizes as decrees many adjudications regarding which doubts existed under the former definition The old code required an adjudication upon "some right claimed or defence set up which *decided* the suit or appeal Now any adjudication which conclusively determines *any* matter in controversy in the suit ranks as a decree So in a partnership suit a decision that the defendant is a partner, declaring the shares of the parties and directing an account to be taken before the suit is finally decreed, clearly falls within this definition[3]" And so does an order declaring the rights of the parties in a partition suit, but leaving the property to be partitioned[4] Section 97 (post) renders it imperative for a dissatisfied party to appeal immediately from such a decision without delaying until the final decree is drawn up, and this new provision no doubt tends to expedite the final determination of such suits

Explanation This makes it clear that a decree may be partly final and partly preliminary, as in the partnership suit above instanced, or, to take another example, in the case of a decree for the recovery of land and mesne profits

Suit The words "right claimed or defence set up in a Civil Court" are not found in this definition, but in order to rank as a decree it is still necessary that the adjudication should be made in a "suit" This word has not been defined in either Act, and the latter half of Sec 582 of the old Code, in which it was *declared to include an appeal in certain cases has not been reproduced in* this Act

It has been held in Calcutta, with reference to the Bengal Court of Wards Act IX of 1879 that the term "suit" includes all contentious proceedings of an ordinary civil kind, whether they arise in a suit or proceedings[5] In a later case a less certain view seems to have been taken, and it was said that a "suit"

[1] (1887) 14 I A at p 165; See also Raja *v* Strinivasa (1888) 11 Mad, 319; and Bakaran *v* Gobind Nath (1890), 12 All, 129 at p 156.

[2] See post

[3] [illegible] 23 Calc, 406

[4]

[5] [illegible] 8 Calc, 500 at p 504; and Chowdhury *v* Sooradhonee,

ought to be confined to such proceedings, as under that description are directly dealt with by the Code of Civil Procedure, or such as by the operation of the particular Acts which regulate them are treated as suits[1] A settlement case under s 104 (2) of the Bengal Tenancy Act, before it was modified by Act III of 1898 B C was held not to be a suit[2] In Bombay the High Court has ruled that any proceeding which terminates in a decree such as a proceeding in execution ending with an order under s 244 of Act XIV of 1882 (reproduced in Section 47 post), is a suit,[3] and the decision in any such proceeding is binding on the parties in the original suit of which it is a continuation[4]

In Madras, however a somewhat different view seems to have been taken and it was held that under Sec 48 (Section 26 post), every suit must commence with a plaint, and no proceeding even if capable of terminating in a decree or an order having the force of a decree is a suit if it has not commenced with a plaint[5]

English Authorities Under the Judicature Act 1873, Sec 100 the word suit includes "action, which is itself defined as a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court and shall not include a criminal proceeding by the Crown A Caveat entered against a grant of probate does not constitute the commencement of an action under the English practice,[6] being regarded as a mere direction to the Registrar to give notice to the Solicitor of the person entering the Caveat if any proceeding should subsequently be taken

Questions within Section 47 These are the questions in execution which are to be determined by the Court executing the decree and are mostly those referred to in Sec 244 of the old Code It must be observed that the word 'within' has been substituted for the phrase mentioned or referred to in The effect of this change of language is to bring within the definition orders made in execution against sureties under Section 142 post and also orders relating to Court fees in suits by paupers made under Order xxxiii, r 13 post[8]

Questions within Section 144 This is the Section substituted for Sec 583 of the old Code and deals with applications for restitution in cases where a decree has been varied or reversed on appeal An adjudication under this section now ranks as a decree

Exception (a) merely reproduces the effect of the old definition by excluding appealable orders see Section 104 post

Dismissal for Default *Exception (b* clears up any doubt that may have existed as to the correctness of the decision in Coshto Behari *v* Hari Mohan[9] and the wording seems comprehensive enough to cover dismissals for any default whatsoever whether under Order IX, r 8 or Order XI r 20[10], or in the case of an appeal from the decree[11] or objections to the execution of a decree[12], all held to amount to decrees under the old Code

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1 Watkins *v* Fox (1895) 22 Calc, at p 948
2 I
3 ..
4 I A, 37.
5
6 Moran *v* Place (1896) P 214
7 Ibid p 220 As to the wider significance of the terms "Civil Proceeding" See Ex p Canadian Trading Corporation (1896 C A) 1 Q B 368, and Stroud's Judicial Dictionary under 'Suit and Proceeding'
8 See Report of Special Committee, notes on clauses
9 (1903) 8 Calc W N, 313
10 See Sec 136 Act XIV of 1882 and Mansingji *v* Haribarram (1895) 19 Bom, 307
11 Radhanath *v* Chandi Charan (1903) 30 Calc, 660, 7 Calc. W N, 450 overruling earlier cases and supported by Ramchandra *v* Madhab (1891) 16 Bom, 23 and, Ex parte Modalatha (1878) 2 Mad, 75
12 Lal Narain *v* Mahomed Rafiedin (1901) 28 Calc, 81

Arbitration.—Orders made under rr 17 and 21 of the second Schedule hereto are not to be deemed decrees within the meaning of the Code.[1] This has been made clear in view of the expressions of the Privy Council in Ghulam Khan v. Mohammed Hassan[2] and to confirm the decision of the Madras Full Bench in Gavidu Magati v. Gavidu Bhagavan[3] which is in conflict with the Allahabad ruling in Dayanand v. Bakhtawar Singh.[4]

Decrees and Orders.—In order to determine whether any particular decision of or formal expression by a Civil Court falls within this definition and so ranks as a decree or is merely an unappealable order the test seems to be

(1) Is there a suit?

(2) Is the subject matter of the decision in controversy in such suit?

(3) Does the decision conclusively determine the rights of the parties with regard to such subject matter?

If these three questions can be answered in the affirmative the decision would seem to amount to a decree; if not, it is merely an order. Questions in execution arising under sections 47 and 144 are of course expressly included in the definition and must be decrees. So a direction to add a party to the suit[5] or a refusal to add a party,[6] or the return of a plaint clearly fail to answer the test and will it is submitted rank as orders under the present Code as, after argument they were held to do under Act XIV of 1882.[7]

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[1] See Report of Special Committee.

[2] (1901) 29 Calc. at p. 183.

[3] (1898) 22 Mad. 297.

[4] (1883) 5 All. 333; see Note to Schedule 2 post.

[5] Upendra Krishna v. Nobin Krishna (1869) 3 B. L. R. O. C., 113.

[6] Abirunnissa v. Kobirunnissa (1895) 13 Calc., 100; Karman v. Misri Lal (1879) 2 All. 904.

[7] Chinnasami v. Karuppa (1898) 21 Mad., 234. The following decisions under Act XIV of 1882 in which various adjudications were held to be decrees, may still prove of service to practitioners. When there is no civil suit, there is not a decree and a right to appeal is not given by this section—Meenakshi v. Subramaniya, L. R. 14 I. A. 160; (1887) 11 Mad., 26; Balkaran v. Gobind Nath, (1890) 12 All., 129, p. 156; and if it exists, it must be given by some law.—Id.; Raja v. Srinivasa (1888) 11 Mad., 319. Code of Civil Procedure.—An order under s. 44, rule (a) O. II r. 4, rejecting an application for leave to join another cause of action with the cause of action in a suit for the recovery of immoveable property—Ban Ihan Singh v. Solhu, [illegible]

[illegible] on an application in furtherance of execution of a decree for possession against a person who resists execution claiming the property as his own—Bonmalee Deb v. Jugodishwari Debi (1887) 14 Calc., 2[illegible]; an order under s. 232 (O. XXI r. 16) allowing a purchaser of a decree to execute it—Afzal v. Ramkumar, (1886) 12 Calc., 610; [illegible] co-transferee of a decree to have his n[illegible] original decree-holder—Gulzari Lal v. [illegible] Narain v. Jai Kishen Das, (1894) 16 All. [illegible] brought upon the record

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made :

This definition is now modified to exclude the transferee of a decree or order, but the rights of the latter remain practically unaltered under Order XXI, r 16 post

is not the legal representative of the judgment debtor—Bishen Dayal v. Bank of Upper India, (1891) 13 All, 290, a decision in execution proceedings determining the period for which mesne profits are recoverable—Bhup Indar v. Bijai, (1901) 5 Calc W N, 52, an order dismissing an application under S 231, (O XXI r 2) that the adjustment of a decree be recorded as certified—Jamna Prasad v. Mathura Prasad (1894) 16 All, 129 (see also Rangji v. Bhaiji, (1887) 11 Bom, 57, Guruvayya v. Vuduyappa, (1895) 18 Mad, 26, and Lingayya v. Narasimha (1891) 14 Mad, 99, an order under s 293 (O XXI r 71) directing a def
arising on a re sale—Kali Kishor v. Guru I
W N, 408, or refusing the application of
of the difference from the defaulter—Am
18 Mad, 127, an order rejecting a
v. Fernandes, (1893) 16 Mad, 127

18 Mad,
All, 844,
pplication
sentatives
, Motiram
n Roy v

Stridavamma, (1887) 10 Mad, 179, an
Mithibai v. Limji (1881) 5 Bom., 45
appeal as barred by limitation—Gulab
Ganga Das v. Ramjoy Dey, (1886) 12
(1885) 7 All, 887, or dismissing an ap
Gopal v. Nilu Nathaji (1885) 9 Bom
v. Ranghavva (1898) 21 Mad, 152 an order rejecting an appeal on the ground that it had not been duly presented—Ayyanna v. Nagabhushanam, (1893) 16 Mad, 285, an order rejecting an appeal on account of scandalous matter contained in the memorandum of appeal—Zamindar of Tuni v. Benayya, (1899) 22 Mad, 155, an order under s 523, (Schedule II) refusing a reference to arbitration—Gowdu Magata v. Gowdu Bhagavan, (1899) 22 Mad, 299 (*contra*, Dayanund v. Bakhtawar Singh, (1883) 5 All, 333), an order of an Appellate Court sending a case to the Court of First Instance with orders
that a formal decree ... ird of the
arbitrators—Bhugwar ... an order
confirming an award ... the terms
of reference —Sadik ... ler passed
on an award that is ... (1892) 15
Mad, 348, a decree ... s and the
submission to arbitra ... , (1895) 18
Mad, 423, an order under s 525, determining that there has been no valid
reference to arbitration a
v. Hakiman, (1898) 25 Cal
an application to file a
All, 427, Ponnusami v. M
Other Acts —An order under s
who has obtained a certi
of a minor—Baldeo Das v
under s 37, Act VIII of
estate had not a right t
Coomar v. Krishna Coom

Orders—see section 36 post

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court

District Court —The Court of the Judicial Commissioner and not that of a Deputy Commissioner was held to be the District Court in Chota Nagpur under the similarly worded definition of the old Code[1] It was also held under that Act that the Deputy Commissioner of the Santhal Parganas has been vested with the powers of a District Judge the effect of which is to make the Santhal Parganas a district[2] The latter half of the old definition declaring the subordination of the various Civil Courts has been transposed to section 3 *see notes thereto*

(5) "foreign Court means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor General in Council

(6) "foreign judgment means the judgment of a foreign Court

of course include the Privy Council it does include all other Courts in ules of the Supreme Court gives that Crown wherever they may be[4] is a foreign Court and as such the judg a defendant who at the time of the suit was e same country are not enforceable against

(7) "Government Pleader includes any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader

It should be observed that the definition has been extended to include a

Judge granting probate of a will under Act V of 1881—Umrao Chand v

Annual rents Where the rents are taken as the test, then, unless the tenants leases contain a contract to pay rent by defined instalments which, independently of any failure to pay on demand, might be made the subject of an action at a certain date within the year, the rents (i e, mesne profits) must be taken to fall due annually and at the end of the year[1], for the right to mesne profits accrues only from the date on which the plaintiff would have received them, if he had not been dispossessed[2]

Profits But in other cases mesne profits were held to cover whatever profits the wrong doer might, with ordinary diligence, have received from an occupation similar to that of the party wrongfully dispossessed,[3] whether it be that of a cultivating ryot,[4] land lord or zemindar,[5] and, to determine the amount, it would be sufficient to show the profits for the years preceding dispossession or afterwards[6] When the position of the plaintiff is that of landlord and tenant combined, and the defendant a sub tenant, mesne profits must be assessed on the value of the crops raised by the defendant

In a suit by a land lord against an occupancy tenant and his vendee, mesne profits must be assessed as damages against the vendee as a trespasser, and the proper measure of such damages is not the rent payable by the vendor, but the actual market value of the land for the purpose of letting[7]

Deductions Deductions, usually 10 per cent, are made for collection expenses[8] and also for Government Revenue, losses by desertion and death of ryots, drought, &c,[10] but charges for management are not allowed unless the party accounting has bona fide believed himself to be in rightful possession[11] Lands of such a nature as would, under ordinary circumstances, yield no profit

Mohun Chunder (1866) 5 W R, Mis, 35, Promotho Nath v Tripoora Soonduree (1868) 10 W R, ...
2 All, 651 For mesne prof
sessed by his landlord, see I
A C, 88, 11 W R, 461, I
Mahomed Azmul v Chadee Lall (1869) 12 W R, 104

[1] Thakoor Doss Roy v Nobin Kristo (1874) 22 W R, 126, Thakoor Doss Acharjee v. Shoshee Bhoosun (1872) 17 W R, 208, Byjnath Pershad v Badhoo Singh (1868) 10 W R, 486

[2] Luckhee Kant Doss v Deen Dyal (1870) 14 W R, 82, supra

[3] Teluck Chand v ... tlc., 506, Roukumee Kooer ...

[4] Nursingh Roy v ... v Gopal Singh (1875) 24 ... W R, 732

[5] Bhyrub Chunder Mojoomdar v Huro Prosunno (1872) 17 W R, 257, Dwarkanath Mitter v Ramdhun (1867) 8 W R, 103 De Silva v Teheraneo ... W R, ... Madhud ...

[6] [illegible]

[7] Gopal Chunder v Bhoobun Mohun (1903) 30 Calc, 536 As to how mesne profits should be calculated when a Hindu widow, in possession of her deceased husband s property, is ousted by an adopted son, see Dalel Kunwar v Ambika Partap Singh (1903) 25 All, 266

[8] Matuk Dhari v Ali Naqi (1888) 10 All, 15

[9] Gooroo Doss Roy v Anund Moyee, (1871) 15 W R, 203, Hurrodurga v ... Ali v Lalji ...

[10] ... Mis, 25; Bulgobind ... 457

[11] ... 868) ... 71; ...

should not be taken into account, unless it has been shown that the judgment debtor could have gained a profit from them [1]

In calculating mesne profits, payments of revenue and cesses should be deducted [2] A trespasser, who, after having been for some time in possession of immoveable property, was ejected in execution of a decree obtained by the rightful owner, cannot have allowed to him in reduction of mesne profits expenses incurred by him in obtaining decrees for rent against tenants on the property in suit [3] Mesne profits can only be ascertained after making deductions from the gross earnings of all such payments made by the defendant as the plaintiff would have been bound to make, if in possession [4] A trespasser is entitled to a deduction of Government Revenue so as to show that there were no profits at all, but he cannot recover any sum so paid in excess of the profits claimed, but must bear the burden of his own wrong [5]

From what date allowed The general rule is, that mesne profits are demandable from the date on which they become annually due [6] To this there is an exception, a purchaser for valuable consideration without notice of plaintiff's title is not liable for mesne profits from any date earlier than the institution of the suit, if the plaintiff has been guilty of laches, [7] though slight delay in bringing the suit will of itself be insufficient to remove the liability [8] Under Art 109 Sch II of the Limitation Act XV of 1877 the defendant is liable for the mesne profits received by him or which he might have with due diligence received, during the three years before the date of suit and not before The period of three years fixed has no reference to the time when the rents fall due [9]

Proof necessary To establish a claim for wasilat, the plaintiff must show that he was entitled to possession [10], and that he was wrongfully kept out of it by the defendant [11] Title need not be proved, unless the defendant proves a better title [12], but a declaratory decree stating that a person is entitled to property without previous possession is not sufficient [13]

The onus is on the wrong doers to show what sums were realized as rent

[1] Becharam Doss v Brojonath (1868) 9 W R., 369 See also Bijoy Gobind v. Kalee Prosunno (1871) 16 W R, 294, and Puran Chunder v. Juggessur Mookerjee (1872) 17 W. R, 298

[2] Dakhina Mohan v Saroda Mohan (1894) 21 Calc., 142, L. R, 20 I. A., 160

[3] Sharfuddin v Fatehyab (1898) 20 All, 208

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[5] Teluck Chand v Soudaminee (1875) 23 W. R, 103, 4 Calc, 566.

[6] See Kooer Ramaput Singh v Turlong (1865) 3 W. R, 38.

[7] Juggurnath Sahoo v Mahomed Hossein (1875) 14 B L R, 386

[8] [illegible]

[9] Abbas v Fassihuddin (1897) 24 Calc, 413; Kishnanand v Pratab Narain Singh L R, (1883 84) 11 I A., 88; 10 Calc, 785.

[10] Radha Churn v. Zumuroonissa (1869) 11 W. R, 83

[11] Dwarkaram Misser v Jogessur, (1874) 21 W. R, 276; Ghoogly Sahoo v. Chundoo Pershad (1874) 21 W. R, 246. See also Churn Singh v Rungoo Singh (1871) 15 W. R, 221

[12] Lep Singh v. Nimar Khasia (1894) 21 Calc, 244.

[13] Kalidas v Vallabhdas (1882) 6 Bom, 79

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[2] Luckhee Kant Doss v Deen Dyal (1870) 14 W R, 82, supra

[3] Teluck Chand *v* Soudaminee Dossee (1875) 23 W R, 108, 4 Calc, 506, Roukumee Kooer *v* Ram Tohul (1872) 23 W R, 106
[4] Nursingh Roy v Anderson (1873) 19 W R, 125, Gooroo Dyal v Gopal Singh (1875) 24 W R, 271, Laljee Shahay v Walker (1902) 6 Calc W N, 732
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[10] Dinobundhoo Nundee *v* Keshub Chunder (1865) 3 W R, Mis, 25, Purmesuree Pershad *v* Aghur Singh (1867) 7 W R, 78, Jainer *v* Balgobind (1867) 7 W R, 230, Erfoonissa *v* Rukeeboonissa (1868) 9 W R, 407
[11] [illegible] 868) 171, [illegible]

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[13] Kalidas v Vallabhdas (1882) 6 Bom, 79

during the period of their possession but it is incumbent on the plaintiff to establish not only the existence of his right but also the extent of it[2]

Entry unnecessary All parties in wrongful possession, irrespective of how they got in are liable[3] Thus an auction purchaser whose purchase is declared invalid[4] a mortgagor after the year of grace[5] a bona fide holder[6] an izaradar with his zemindar an under tenant[8] a person in possession with apparent colour of right and afterwards legally ejected,[9] a purchaser with notice of the defect of his title but not a vendor[11] unless he has kept the vendee out of possession[12] the actual occupier with his lessor[13] subsequent lessees taking possession and collecting rents after the expiry of the lease of the previous lessees but before notice of ejectment required to be given by the lessor under s 36 of the N W P Rent Act (XII) of 1881)[14], are all liable for mesne profits but ryots are not bound to pay rent before the decree holder is put in possession A purchaser of property at a sale under the Rent Recovery Act who enters into possession thereof is in rightful possession until the decree is set aside He is not therefore a trespasser and liable to make good any loss sustained by the rightful owner being kept out of possession but he is bound to account for mesne profits the calculation of which is to be based on a proper discharge of the stewardship of the *property*[15]

A lessor preventing ryots from paying his lessee is liable so a mortgagor who after the mortgagee had foreclosed and got a decree neither gave up possession to the mortgagee, nor told his lessee to pay the latter rent was cast in mesne profits[16]

Enjoyment of profits It is also unnecessary to show that the defendant has enjoyed the mesne profits instead of the plaintiff It is enough to show that he has been active in keeping the plaintiff out of possession and enjoyment of the property If he has done so wrongfully he is bound to pay to the plaintiff consequential damages, whether he derived any profit himself from the possession of the land or not[17] In the case of every wrong doer, the liability of a defend

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[2] *Brojendro Coomar v Madhub Chunder* (1882) 8 *Calc* 343 see also Rakoomee Kooer v Ram Tahul (1872 17 W R, 166 Everything is to be assumed against them—Doorga Soonduree v Shibeshuri (1876) 9 W R 101 See also Mahabir Pershad v Radha Pershad (1891) 18 Calc, 540

[3] Ishan v Ainuddin (1880) 5 Calc W N, 720

[4] Puran v Ahmad Ali Khan (1865) 4 W R Mis, 7, Hera Lall v Girdharee (1867) 8 W R, 450 Suttya Nundo v Suroop Chunder (1870) 14 W R, 76

[4] Jey Narain v Torabun (1872) 4 Agra, 216

[5] Suroop Chunder v Mohendler Chunder (1874) 22 W. R, 539, but see Rasundhoo v Khodu Newaz (1883) 12 C L R, 470

[6] Mugun Chunder v Sarbessur (1867) 8 W R, 479, Bijnath Pershad v Ludhoo Singh (1868) 10 W R, 486

[7] Bidhya Moyee v Ram Lall Misser (1872) 17 W R, 148

[8] Ram Chunder Surmah v Ram Chunder Pal (1875) 23 W R, 226

[9] Abdool Kureem v Campbell (1867) 8 W R, 172

[10] Umamoyi v Tarini (1867) 7 W R, 225

[11] Shurut Chunder v Jadub Narain (1864) 1 W R, 93

[12] Nilkamal v Gunomoni (1871) 7 B L R 113 P C

[13] Mudan Mohun v Ram Dass (1880) 6 C L R, 337

[14] Shitab Dai v Ajudhia Prasad, (1888) 10 All, 13

[15] Woomesh Chunder v Markand Mookerjee, (1870) 12 W R, 35

[16] Perumal v Krishnamma, (1894) 17 Mad, 261

[17] Bheekumbar Singh v Raj Chunder (1871) 15 W R 106, Shamasunkur Chowdhry v Sreenath Banerjee, (1869) 12 W R, 341

[18] Suroop Chunder Roy v Mohendler Chunder, (1874) 22 W R, 539

[19] Ghoogly Sahoo v Chundeo Pershad, (1874) 21 W. R, 246.

ant is limited to damages for the wrong which he himself has done If a defend- [illegible]

Effect of a decree for mesne profits —The decisions declaring the incidents of the liability imposed by a decree for [illegible] suit for damages against several persons for [illegible] they are all equally liable to him and [illegible] portion of the property in his possession [illegible] suing any one of them probably a decree against the others would bar a new suit against him though in one case it was held that unless the plaintiff sued all the defendants under a decree for possession his suit would be dismissed, because if he did not do so, the parties cast would have no remedy against the other wrong doers, whereas this would not be the case if the decree bound them all, and only some of them paid [4]

Contribution Form of decree —In some cases in an action for damages, the whole liability has been divided in proportion to the amount of profits that each has derived from the wrongful possession,[5] and this rule has been followed, even though there was no such limitation in the decree,[6] on the ground that a person s liability to satisfy a joint and common decree would in equity extend no further than to the particular land he was in possession of [7]

Interpretation —A decree for interest on mesne profits from the date they are ascertained means the date they have been ascertained by the Court and not by the Ameen [8] A decree specifying no time down to which mesne profits are to be computed cannot be construed as giving mesne profits for more than three years from the date of the decree [9] even though possession is not delivered during that period [10] When a decree for possession with mesne profits was taken to the Privy Council in appeal and was affirmed, *held*, that the three years up to which mesne profits may be given must be counted from the date of the King's order [11]

Shebait —A decree for mesne profits against a person who claimed the lands as shebait of a Hindu idol, where the profits of the lands had gone into the idol s treasury, has been held not to be a decree against the person as an individual but as shebait, and to be satisfied out of the idol s property,[12] the necessary expenses of the idol must be allowed [13]

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[1] Abbas v Fassihuddin (1897) 24 Calc 413 Haradhan v Joy Kisto (1869) 11 W R 444, Indurjeet Singh v Radhey Singh (1874) 21 W R, 269

[2] Padmanund Singh v Madhu Singh (1899 3 Calc W N clxxxvii Kishna nand v Partab Narain Singh, (1884) L R, 11 I A, 88 10 Calc 785

[3] Jhoonkee Paurey v Ajoodhya (1873) 19 W R, 218

[4] Suttya Nundo v Saroop Chunder (1870) 14 W R, 76

[5] Fuzul Mahomed v Raj Coomaree (1866) 6 W R, 113, Collector of Bogra v Shama Shunkur (1866) 6 W R, 230

[6] Bulwunt Singh v Sheo Sahove, (1865) 2 W. R, Mis 52

[7] Gunesh Dutt v Bulwunt Singh, (1870) 14 W R, 175, Krishna Mohun v Kunjo Behari (1881) 9 C L R, 1, contra Jhoonkee Paurey v Ajoodhya Doss, (1873) 19 W R, 218

[8] Doorga Sunduree v Shibessuree, (1868) 10 W R, 391

[9] Uttamram v Kishor Das (1900) 24 Bom, 149

[10] Narayan v Sono (1900) 24 Bom, 345

[11] Bhup Indar v Bijai Bahadur, (1901) 5 Calc W N, 152, 23 All, 152, L R 27 I A, 209

[12] Shibeshureeo v Mothoornath Acharjee (1866) 5 W R, 202

[13] Thakoor Doss v Shosheo Bhoosun, (1872) 17 W R, 208

Interest.—[illegible] may be awarded as [illegible] from an earlier or later [illegible] in accordance with the [illegible] be granted or not [illegible] of the case.[1]

[illegible] be allowed on arrears.[2]

Bengal.—[illegible] has been allowed arrears.[3] No difference [illegible] between [illegible] paid [illegible] and paid [illegible] a decree holder is entitled [illegible] found to be due and not only on [illegible] the decree.[4]

Bombay.—[illegible] where the case fell [illegible] the Court expressed a [illegible] from the date of possession to the [illegible] case of [illegible] v. Modee [illegible] for mesne profits [illegible] and carried interest by its own [illegible] that such a practice was neither unreasonable [illegible] kept the sum of 20 years out of the [illegible] in Bombay, their lordships [illegible] interest on each annual payment from [illegible][7]

Allahabad.—[illegible] interest on such mesne profits, and [illegible] the date on which each instalment of the mesne profits became [illegible][10]

Appeal.—[illegible] a decision determining the period for which mesne profits [illegible][11]

Jurisdiction, second appeal.—A suit for mesne profits is cognizable [illegible] and a second appeal is barred if the subject matter [illegible] less than Rs. [illegible][12]

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1 [illegible] Roy, (1878) 3 Calc., 654; Luckhy Narain v. Kally Puddo, (1879) 4 Calc., 882; 4 C. L. R., 69; see also [illegible] (1870) 14 W. R., 151.

2 [illegible] L. R. 11 I. A., 88 p. 93; 10 Calc., 785; [illegible] Roy, (1900) 27 Calc., 951, [illegible] Guru Prosunno [illegible] between mesne profits [illegible] (1882) L. R. 9 I. A., [illegible] (1882) 8 Calc., 343

3 [illegible] (1901) 23 [illegible]

4 [illegible] (1879) [illegible] 317; 4 Calc., 674; Luckhy Narain v. Kally Puddo, (1879) 4 Calc., 882; 4 C. L. R., 69.

5 [illegible] (1868) 10 W. R., 209. In the following [illegible] before assessment—Bengal Coal Co. v. Dareembah [illegible] Chura (1869) 11 W. R., 25.

6 [illegible] (1903) 7 Calc. W. N., 437; 30 Calc., 506.

7 [illegible] (1881) 9 Bom. H. C., 7; Gundo Anandrav v. [illegible] (1880) 4 Bom. [illegible], 55.

8 [illegible] 8 Moo. I. A., 230.

9 [illegible] Collector of Surat, (1860-61) 8 Moo. I. A., 1; 4 W. R., [illegible]

10 [illegible] (1901) 23 All., 273.

11 [illegible] (1901) 5 Calc. W. N., 52; 23 All., 152; 27 I. A., [illegible]

12 [illegible] 23 Calc., 884, followed [illegible] 193 and Lingayya [illegible] the rule is different in [illegible]

(13) "moveable property" includes growing crops

This new definition of moveable property puts an end to the uncertainty existing under the decisions of the different High Courts upon the point[1] In Bombay, Allahabad and Madras growing crops were held under the old Code to be immoveable property and in two later Calcutta cases it was held that crops were not moveable property until severed from the ground[2]

Growing Crops —Presumably this term covers only such vegetable growths as may be harvested from time to time thus tea bushes or coffee shrubs, it is submitted, will not fall within the definition the leaves and berries only being regarded as growing crops A similar distinction appears to exist between grass and turf[3]

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree

Order —This must be read with the definition of Decree see p 6 ante, and notes thereunder The following decisions under Act XIV of 1882 in which various orders were held not to amount to decrees may be useful by way of reference

Under the Code of Civil Procedure —An order for the inspection of documents[4] an order that when a condition should be performed a decree would be passed[5] an order to pay the costs of the day,[6] an order as to costs in a suit allowed to be withdrawn,[7] an order disallowing an application under sect 372 (old Code) (See Order XXII, r 12) to be made a party as assignee[8] an order under sect 373 (old Code) (See Order XXII, r 1) allowing a suit to be withdrawn[9] an order directing a suit to be re admitted and registered[10] an order granting[11] or refusing[12] a certificate of fitness for appeal to the Privy Council, or refusing to extend time to furnish security,[13] an order by the High Court refusing to appoint Receiver[14] An order in exercise of the Court's inherent jurisdiction to punish contempt[15]

Under other Acts—An order under Act XXVII of 1860,[16] an order

Mad , 155

2 Surat Lal Mondal v Umar Haji (1895) 22 Calc 877 , Mangan Jha v Dolhin Golab (1898) 25 Calc , 693 , 2 Calc W N 265

3 Shephard and Brown s Transfer of Property Act, 6th Ed p 16

4 Sonbhai v Ahmedbhai, (1872) 9 Bom H C , 398

5 Coverji v Morarji (1885) 9 Bom 183

6 Shanks v Secretary of State (1889) 12 Mad , 120

Rama Kissor v Sriranga (1898) 21 Mad , 421

8 Lolit M Roy v Shebock C Chowdhry, (1900) 4 Calc W N , 404 , Tej Singh v Chabeli Ram, 21 All , 312

9 ... k v Dick (1893) 15 All , 16 All , 19 Genda Mal ... (1891) 15 Bom , 370 , Abdul Hossein v Kashi ... contra, Ganga Ram v

10 Hirdamun v Jinghoor, (1880) 5 Calc , 511

11 Mowla Baksh v Kishen Pertab (1876) 1 Calc , 102, Tarachand v Radha Jiban, (1875) 24 W R , 148 , Lutf Ali v Asgor Reza (1890) 17 Calc , 455

12 Manly v Patterson, (1881) 7 Calc , 339

13 Kishen Persad v Tiluckdhari, (1891) 18 Calc , 182 , Amirunnissa v Lehary Lal, (1876) 25 W R , 529

Chandi D Jha v Pudmanand Singh, (1895) 22 Cal , 928

15 Godu Ram v Suraj Mal (1905) A W N , 10 , 27 All , 280

16 Alta Sundari v Srinath Saha, (1893) 20 Calc , 641

under s 10 Act XX of 1863 [1] an order under s 18 Act XX of 1863 granting or refusing leave to institute a suit [2] an order under the Madras Rent Recovery Act (VIII of 1865) [3] an order by a D[illegible] for the grant of a certificate of administration [illegible] penalty to be enforced under [illegible] person as cantor under the Pr[illegible] application for the removal of a trustee [7] an order under s 214 Act VI of 1882 [8] an order under s 84 Act VIII of 1885 for the acquisition by the landlord of a part of [illegible] ryots hold[illegible] an order rejecting an application under s 93 of the same Act [10] an order under s 173 of that Act setting aside a sale [11] an order under s 174 of the same Act [12] an order of a single Judge of the High Court declining to exercise the discretionary power given by s [illegible] XIX of 188[illegible] [13] an order requiring security for the grant of a certificate under Act VII of 1889 [14] an order of a District Court under the Guardians and Wards Act (VIII of 1890) refusing to remove a guardian [15] an order of a District Judge under s 18 of the Land Acquisition Act dismissing a suit for apportionment and referring the parties to the Civil Court, [16] an order under Act XX of 1860 giving leave to sue for accounts of a religious endowment [17] the order of an Assistant Collector of the 1st class under Act II of 1901 [18]

(15) pleader means any person entitled to appear and plead for another in Court and includes an advocate, a vakil and an attorney of a High Court

Advocates —The Advocate General and the officiating Advocate General for the time being are entitled to precedence [19] and advocates have precedence over pleaders [20] They can appear and plead on the Appellate Side of the

M[illegible] (1888) 11 Mad [illegible] L P 14 I A 16[illegible]

2 [illegible] (1892) 19 Calc [illegible] Kazim Ali v Azim Ali Khan (1891) 18 Cal [illegible] [illegible] in re (1887) 10 Mad, 95 note [illegible] (1874) 21 W R 368

3 P[illegible] Raja Gopala (1890) 13 Mad 248

4 [illegible] Lucas (1893) 20 Calc 245

5 [illegible] (1890) Calc 311

6 A[illegible] Gopal Dass (1890) 17 Calc 48

7 Wilso[illegible] McAfee (1890) 19 All 131

8 Reference under C[illegible] Fees Act (1895) 17 All 235

9 Peari Mohun [illegible] (1892) 19 Calc 48 Coghlan Molla v Pameshar Narain (1891) 18 Calc [illegible]

10 Hossain Bux v [illegible] (1887) 14 Calc, 312

11 Ra[illegible] Singh v [illegible] Singh (1894) 21 Calc 62 see also Haran [illegible] Harish Chandra (1899) 3 Calc W N 184

12 Sibh Narain [illegible] (1899) 3 Calc W N, 344 Kishori Mohun [illegible] (189[illegible]) 1 Calc W N 30

13 [illegible] Dutt v Pursotam (1893) 15 All 373

14 [illegible] (1896) 19 Mad 199

15 Im[illegible] Anwarullah (1898) 20 All 133 Pakhwant v [illegible] Narain (1896) 23 Calc, 301

16 Harish Chandra v [illegible] (1904) 8 C [illegible] W N 321

17 Mozaffer v Mirza Ali (1907) 5 C [illegible]

18 [illegible] Manni Lal (1906) 28 A [illegible] overruling Kharag [illegible] Ram (1901) 23 All [illegible] and see [illegible] (190[illegible]) 27 All [illegible]

19 [illegible]

20 See [illegible] newspaper 21st May 1872

High Court, but not act—*i e*, they can appear and represent the client at the various stages of the litigation at which it is necessary that the client be present in person or by representative, but they cannot take any step in the Court or its offices necessary to lay the cause properly before the Court. *They cannot file an appeal or any other application in the Registrar's office.*

Instructions—There is an usage approved by the Courts as conducing to the benefit of suitors and to the satisfactory administration of justice that counsel should be instructed by solicitors,[3] and this rule applies to the Original sides of the Chartered High Courts but does not extend to non contentious business such as the preparation of a will. In other courts in India a barrister may, it seems, be instructed by a client without the intervention of any attorney or pleader in cases where the client has appeared in the suit in person [5]

Fees—No binding contract can be entered into between counsel and client in respect of the former's service. He cannot maintain a suit for "honorarium" and conversely the client has no remedy against counsel for non attendance or negligence [6]

Authority to bind Client—In England counsel have complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, and other matters which properly belong to the suit and the management and conduct of the trial. And where counsel consents to withdraw a juror, the compromise is binding on the client although he dissents, unless such dissent was known to the knowledge of the opposite party at the time [8] A consent cannot not be set aside on the ground of mistake except for reasons sufficient to set aside an agreement [9] But if counsel has received express instructions to the contrary[10] or has consented against his client's express wish[11] the consent will be set aside. Similarly where the consent is given under a misapprehension or through a misstatement or want of materials, or if all the information a counsel ought to have, when he gives his consent is not before him, the client is not bound [12] A compromise as to matters collateral to the suit is not binding upon the client unless he expressly assents thereto,[13] and where counsel under a misapprehension of his client's instructions and, believing himself to have authority, acts without it, he cannot bind his client [14]

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[1] Kali Kumar *v* Nobin Chunder, (1881) 6 Calc, 585 at p 590

[2] In re Ram Taruck Barrick, (1870) 13 W R, 60

[3] Bennett *v* Hale, (1850) 15 Q B, 171

[4] See Marchant's Barrister at law p 42

[5] Gobind Chunder Dutt *v* Andrews, (1875) 24 W R, 15

[6] Reference (1886) 9 Mad 140, Smith *v* Ganeslee Lall, (1871) 2 ... 83 Achamparambath *v* Gantz, (1878 81) 3 Mad, 183, Alston *v* ... Das, (1903) 25 All, 509 As to the recovery of rewards for ... services rendered by a barrister see Land Mortgage Bank *v* ... W R, 332

[7] Swinfen *v* Lord Chelmsford, 29 L J (Ex) 382, Matthews *v* ... Q B D, 131 Urquhart *v* Butterfield 37 Ch Div, 357 at p ... Devon Mine, in re, 38 Ch Div, 51

[8] Strauss *v* Francis, L R 1 Q B, 379

[9] Attorney General *v* Tomline, 7 Ch Div, 388 Davis *v* Davis, 13 C. D, ...

[10] Scheyer *v* Hortner, 90 L T Jo, 116 Lewis *v* Lewis, 45 Ch D, 281

[11] Carrison *v* *Rodrigues*, *(1886) 13 Calc*, 115

[12] Holt *v* Jesse 3 C D, 177, and see Hickman *v* Berens, (1895) 2 Ch ... Wilding *v* Sanderson, (1897) 2 Ch, 534

[13] Swinfen *v* Swinfen, (1857) 1 C B, N. S, 364, Nundo Lal Bose *v* ... (1900) 4 Cal W N, 169

[14] Nundo Lal Bose *v* Nistarini, (supra)

Undertaking not to appeal —An agreement not to appeal, provided the decision be confined to a certain point is binding on the client[1] Where the undertaking was not embodied in the order an appeal was admitted and entertained in England[2] The giving of such an undertaking is within the implied authority of counsel and it cannot be withdrawn in the absence of misapprehension or surprise[3]

Admission —An erroneous admission of counsel on a point of law does not bind the party[4]

Oath The Court will accept a statement from counsel without burdening him with an oath

Immunity from action for defamation —No suit lies against a barrister for defamatory words spoken as counsel in the course of any judicial proceeding with reference thereto even though unnecessary to support, and irrelevant to his client's case and uttered without just fication or excuse[6]

Robing —Where an advocate or pleader is himself a litigant, he must elect either to conduct the case entirely in person as a litigant or leave the case to his counsel or pleader If he conducts his own case he should do so in the same way as any ordinary litigant and ought not to address the Court in robes or from the bar[9]

Receipt —A receipt given by counsel for a fee for professional service is exempt from stamp duty

Attorneys and Solicitors —An attorney having once undertaken the conduct of a case is bound to prosecute it with due diligence[10] He cannot say that unless a large sum is paid to him he will not continue to conduct it[10] or abandon it at his pleasure[11]

An attorney is not entitled to any reward beyond his just and fair remuneration He cannot split up his functions by acting partly as attorney and partly as agent[12]

A party cannot appear if he has an attorney on the record[13] A warrant of attorney to defend unless specifically restricted in form empowers an

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[1] Amir Ali v Inderjeet Sing (1871 72) 14 Moo I A 203

[2] Hull and County Bank in re, 13 C D, 261

[3] West Devon Mine in re 38 Ch D, 51, as to the effect of such an undertaking on behalf of an infant see Rhodes v Swithinbank, 22 Q B D 577

[4] Lala Irshad v Dadh Nath Roy (1899) 26 I A 216 (1900) 27 Calc, 156 4 Calc W N, 274 followed in Ramsaran v Khalhari (1907) 11 Calc W N 340

[5] Nistarini v Nundo Lal Bose (1899) 3 Calc W N, 694, Nundo Lal v Nistarini (1900) 4 Calc W N, 169 27 Calc 156 following Hickman v Bren supra Willing v Sanderson supra and Neale v Gordon Lennox, (1902) 1 K B, 838 (C A)

[6] Munster v Lamb 11 Q B D 588 and Odgers on Libel 4th Ed 229 and cases there cited

[7] New Brunswick Co v Conybeare, (1862) 9 H L C, 711

[8] West Hapton Tea Co in re (1887) 9 All, 150

[9] Stamp reference, (1886) 9 Mad, 140, and (1894) 16 All, 132

[10] Atul Chunder Mukerjee v Sashi Bhusan Mullick (1902) 29 Calc, 63, 6 Calc W N 215, Lamanto Kumar Mitter v Kusum Kumar Mitter, (1900) 4 Calc W N, 767

[11] Underwood v Lewis (1894) 2 Q B, 306 Court v Berlin, (1897) 2 Q B, 396, Comp Lom e in re (1893) 2 Q B, 486

[12] Brojendra Nath Mullick v Lakhheemonee Dassee, (1902) 29 Calc, 795; 6 Cal W N, 816

[13] Panchar an Singh v Polley, (1897) 2 Q B, 122 and compare Newen, In re, (1903) 1 Ch, 815

attorney to act for the defendant in the High Court, whether in its original or appellate jurisdiction [1]

Security for costs—There is no rule which prevents an attorney from taking security from his client for the payment of costs actually due with interest thereon at a fair and reasonable rate [2]

Authority to bind Client—An attorney has no authority to compromise a claim before suit[3] or to compromise a suit after judgment, and his authority only extends to doing his best for the purpose of obtaining the fruits of the judgment for his client [4] A compromise made pending suit by an attorney will not be binding if the opposite party has knowledge that it is not sanctioned by the client of the attorney If such a compromise be unreasonable or improper the attorney will be liable to the client for damages [5] It has been held in England that if a solicitor acts on authority after it has been revoked he will be liable if he knew or by diligence might have known, of the revocation [6]

Costs—When attorneys have been changed during the pendency of a suit, and the second attorney recovers the costs of both from the client after notice that the costs of the first attorney are unpaid he does so on behalf of the [illegible]

plaintiff's attorney of his costs and he could not make any payment under the compromise if he had notice of the attorneys lien [8] No attorney has a right to insist on payment of part costs as a condition to the further prosecution of his client's cause [9] An executor desiring to change an attorney must pay him his costs as well as his past costs incurred in the life time of the testator [10] Leave will not be given by the Court for a change of attorney until the costs of the attorney are first paid or provided for [11]

Infant—Where the client is an infant, the attorney may in some cases recover his costs as necessaries [1]

Taxation—Declining an attorney's offer to have his bill of costs taxed will not (at least in some cases) bind the client to pay without taxation [12]

Lien—The general lien of a solicitor on documents is merely a right to keep back from his client any documents he has received and holds as a

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[1] Kassim Manoojee v Gopal Lal Seal (1899) 3 Calc W N, 579

[2] Monahur Dass v Romanath Law (1878) 3 Calc, 473 as to the rules applicable to an attorney doing mofussil business for an attorney in the mofussil, See Shumsoonissa v Carapiet (1858) 1 Boulnois 331

[3] Macaulay v Polley (1897) 2 Q B, 122 and comp Newen in re (1903) 1 Ch, p 818

[4] Lovegrove v White L R 6 C P 440 Butler v Knight [illegible]

[5] Ja[illegible]

[6] Salton v New Beeston Co, (1900) 1 Ch, 43

[7] Orr v Norendra Nath Sen (1892) 19 Calc, 368

[8] Khetter Kristo v Kali Prasanno (1888) 15 Calc, 887 2 Calc W N, 503

[9] Basanto Kumar Mitter v Kusum Kumar Mitter, (1900) 4 Calc W N, 767.

[10] Girindro Kumar Dutt v Annalya Charan Ghose, (1902) 6 Calc W N, 306

[11] Ramasami v Sulban Chetti (1900) 23 Mad 134 and see Satya Sankar v Golapmani (1899) 3 Calc W. N, cexi, Ghassee Icmadar v Nasiruddin, (1899) 26 Calc, 769

[12] Watkins v Dhunnoo Baboo, (1881) 7 Calc, 140, but see Steed v Preece L R, 18 Eq, 192

[13] Monohur Dass v Romanath Law, (1878) 3 Calc., 473

solicitor until his bill of costs is satisfied It is a right derived through the client and he cannot have a better right than the client, if they are subject to the rights of third parties such parties can follow them into the hands of the solicitor[1] He has the same lien on translations as on other documents, and cannot be compelled to produce them, when discharged by his client, unless on terms which will secure him from fraud[2] When costs are paid the lien is at an end and the solicitor cannot retain them against a third party[3] An attorney who discharges himself from his client's service loses his lien over his papers[4] and will be prevented from acting for the opposite party in the suit[5]

Mortgage —If in effect of a mortgage of his client's property, he also acts as solicitor for the mortgagee he cannot claim as against the latter, a lien on the title deeds or mortgage deeds for costs due by the mortgagor[6] The equitable right of a mortgagor to have back his deeds *from* the mortgagee on payment of the money due prevails over the solicitor's lien claimed in right of the mortgagee

An attorney has no lien for costs on papers belonging to an estate being administered by the Court[8]

His lien cannot be given effect to in summary proceedings, but should form the subject of a regular suit[9]

Pleaders and Vakils — Pleader and Vakil are synonymous terms[10] The Courts in which a particular pleader is entitled to plead will depend upon the terms of his certificate[11] He can plead in the criminal courts on behalf of either accused or the prosecutor[12]

No pleader of a High Court can be admitted as agent to practise in the Privy Council[13] Pleaders of the High Court in Calcutta are entitled to practise in the Calcutta Small Cause Court[14] but the rule of the Bombay Courts is different[15] Pleaders of the Mofussil Courts in Bengal are not as such, entitled to practise in the Calcutta Small Cause Court[16]

Vakalatnamah A vakil is competent until his vakalatnamah is revoked to appear for his client in an appeal, filed by him, and in all its subsequent

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[1] Pelly v Wathen 1 De G M and G 23 Capital Fire Co, in re, 24 C D, 408 Llewellin, in re (1891) 3 Ch 145 Lawrence in re (1894) 1 Ch, 556, Hawkes, in re (1898) 2 Ch, 1 see Annual Practice 1905 II 422 et seq.

[2] K[illegible] v Narrayan (1880) 4 Bom, 353 Atool Chandra Mookerjee v Soshee Bhusan Mukerjee (1902) 29 Calc, 63 6 Calc W N, 215, Hardas Mullick v Manick Lal Mullick (1904) 8 Calc W N, xcvi

[3] Emma Silver Mining Co in re, 24 W R, 54

[4] Meyalunkale in re, (1881) 6 Calc 1 Atool Chunder Mookerjee v Soshee Bhusan Mukerjee 29 Calc, 63, 6 Calc W N, 215, Basanta Kumar Mitter v Kusum Kumar Mitter (1900) 4 Calc W N, 767

[5] Ramlall Agurwallah v Moona (1881) 6 Calc, 79

[6] Sall in re 6 C D, 105, Manson and Taylor, in re, 10 C D, 729, Brunton v Electrical Corpn (1892) 1 Ch, 434, and see Sheffield v Eden, 10 C D, 291

[7] Llewellin in re (1891) 3 Ch, 145, and generally on this subject see Annual Practice, (1905) II 423

[8] Belaney v French L R, 8 Ch, 918 see Pollen v Hensby, (1892) 1 Ch, 101.

[9] Usman v Imam Ali (1881) 7 Calc, 491 Mahomed Zahurudin v Mahomed Nuruldin (1894) 21 Calc, 85

[10] Pleaders of the High Court, in re, (1885) 8 Bom, 105

[11] Legal Practitioners Act XVIII of 1879 ss 7, 10 and Schedule II

[12] Chunder Coomar v Chunder Koomar, (1870) 14 W R, Cr, 23

[13] Tulsi Das Sil, in re, (1867) 7 W R, 228

[14] Tulsi Das Sil, in re 7 W R, 228

[15] Pleaders of the High Court, in re, (supra).

[16] Shashee Bhoosan Bhadooree, in re (1868) 10 W R, 82

stages [1] but he will not be heard in second appeal unless grounds of appeal have been filed and certified [2]

A pleader may decline a brief without giving any reason [3]

A vakil may *present an application for the restoration, to the list of pending* appeals of an appeal dismissed for default without filing a fresh vakalatnama [4]

Control of Case —The senior pleader present has the entire control of the case and a junior will not be allowed to argue points in appeal waived by him [5] A pleader using improper expressions during the course of argument should be stopped [6] and if he misconducts himself the Court may decline to hear him, but cannot dismiss the case in which he is engaged without trying it on the merits [7] No pleader should be called upon to produce his instructions he is responsible for any statement he may make [8]

Binding Client —P [illegible] the bona fide acts of [illegible] pleade[illegible] within the scope of their [illegible] ground for avoiding them [illegible] Courts before acting upo[illegible] authority in the peculiar matter in which they are employed [10] If a pleader conducting a case makes an admission as to payments made and the state of an account between the parties it is binding on his client,[11] and a record of an admission made by a pleader, must be taken to be correct until contradicted by an affidavit of the pleader, or admitted to be wrong by the judge,[12] but if a pleader be examined as a witness his evidence is not treated as an admission [13]

Under a vakalatnama couched in general terms, a vakil has power to withdraw a suit and bind his client [14] A pleader may ask for an issue to be framed or may abandon one that has been framed and his action will bind his client [15] It has been held that an admission of liability by a pleader is sufficient to warrant a decree [16] An admission of fact by a pleader, which, but for such admission, the opposite party would have an opportunity of proving, will bind the client [17] but it is not within the ordinary scope of his authority to compromise the suit he is engaged in[18] or instead of conducting the

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[1] Shah Mukhun Lal v Sree Kishen Singh (1867) 8 W R, 92

[2] Ohullah v Bachulal, (1888) 15 Calc, 705

[3] In re Nobin Ch Das Gupta (1908) 35 Calc 317 Sc 12 C W. N, 381

[4] Raghunath v Raghubir, (1893) 15 All 55

[5] Sreeneebash Roy v Umbika Churn, (1869) 12 W R, 375

[6] Cruise in the matter of (1870) 14 W R, Cr, 53

[7] Lal Chand v Shakeer Mahomed (1866) 6 W R, 67

[8] Rajkissen Surma petitioner S D, Sum Dec Sept 16 1846, see Evidence Act of 1872 ss 149 (illus) and 150

[9] Pesch v Madud Hossein S D, N W 1855 p 134, Burkut Hossein petitioner S D, Sum Dec March 22nd 1842

[10] Venkataramanna v Chavela (1883) 6 Mad H C, 127

[11] Berkley v Chittur Koear (1883) 5 All H C, 2, Kalekanund v Giribala (1868) 10 W R, 322 Rajundar Narain v Bijai Govind Sing (1837 41) 2 Moo, I A, 253

[12] Hur Dyal v Heera Lall (1871) 16 W R, 107

[13] Rash Behary v Juggodumba 2 Sev Rep, 88

[14] *Ram Coomar v Collector of Beerbhoom, (1866) 5 W R, 80*

[15] Venkata Narasimha v Bhashyakarlu, (1899) 22 Mad, 538

[16] Srimati Dasi v Pitambar, (1874) 21 W R 332

[17] Narain Roy v Sreenath Mitter (1868) 9 W. R, 485

[18] Prem Sookh v Pirthee Ram 2 Agra, 222, Sirdar Begum v Izzutoolnisa, (1870) 2 All H C, 149, Jagapati Ekambara, (1898) 21 Mad, 274

patwari[1] a collector appointed to take charge of the estate of a minor,[2] or as agent for the Court of Wards under Sec 204 Act XIX of 1873,[3] and an officer of the Indian Staff Corps [4]

Illustration

"A Municipal Commissioner is a public servant

"*Explanation 1* Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not

'*Explanation 2* Wherever the words public servant occur they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

It would, therefore appear that neither a Municipal Commissioner, nor an Engineer, who receives and pays in a municipal money is a public officer although they are both public servants R v Nutamchand Uttamram 6 Bom, H C, Cr Ca, 64

Court of Justice—No definition is given in this Code In the Penal Code it is defined as follows —

'The words 'Court of Justice' denote a Judge who is empowered by law to act judicially alone or a body of Judges which is empowered by law to act judicially as a body when such Judge or body of Judges is acting judicially

'A Punchayet acting under Regulation VII of 1816 (1) of the Madras Code, having power to try and determine suits, is a Court of Justice'

(*18*) "rules" means rules and forms contained in the First Schedule or made under Section 122 or Section 125 .

(*19*) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds and

(*20*) "signed"[5] save in the case of a judgment or decree, includes stamped.

The new definitions (16), (18) and (19) speak for themselves and it may be noted that the definition of the word "written" is omitted from this Act, see sect 3 (58) General Clauses Act 1897

It has been held that the writing by a Raja of his title may constitute a sufficient signature to a lease [6]

Mark—By cl (52) sect 3 of the General Clauses Act, "Sign" with reference to a person, who is unable to write his name includes "mark" Under the Registration Act III of 1877, sect 3, "Signed" includes and applies to the affixing of a mark A marksman can be an attesting witness under s 59 of the

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[1] Queen v Madsooddeen, (1878 80) 2 All H C, 148, but not a patwari employed in preparing a Teiskhana Register Baijnath v Sukhu Mahton (1891) 18 Calc, 534

[2] Bhan Balapa v Nana, (1889) 13 Bom, 343; Narsingrav v Luxmanrav, (1876) 1 Bom, 318, comp Mohan Ishwar v Haku Rupa (1880) 4 Bom, 638.

[3] Collector of Bijnor v Munurar, (1880 1) 3 All, 20

[4] Calcutta Trades Association v. Ryland (1887 ...

The defini... of publi...

Tenth—...l ..., to take ... expen... ... make ... rate o... for ... to mal... of the

[6] Gunee L... ..., 8 W. R., 395

Transfer of Property Act and s 68 of the Evidence Act[1] But under the Indian Succession Act of 1865 "Sign" in sect 50 does not include a mark signature[2]

Stamped.—It is not a condition precedent to the use of a stamp that the person using it should be unable to write his name[3] The affixing of a testator's name by a facsimile stamp in sufficient to meet the requirements of s 50 of the Indian Succession Act[4]

Subordination of Courts

3 For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court

This section has been taken from the definition section of the old Code, the language being slightly altered This special and separate section brings into greater prominence the ruling that Judges of the Lower Courts are bound to follow the concurrent decisions of the High Court to which they are immediately subordinate[5]

High Court "High Court used with reference to civil proceedings means the highest Civil Court of Appeal in the part of British India in which the Act or Regulation containing the expression operates[6] It, therefore, includes the Chief Court of the Punjab and Burmah and of the various Judicial Commissioners as well as the Chartered High Courts

Savings

4 (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

This section applies to H C

This section is intended to effect all the savings covered by Section 4 of Act XIV of 1882, a portion of which has become obsolete since that enactment was passed[7] The acts specifically mentioned in that section were

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[1] Pran Krishna v Jadunath (1898) 2 Calc W N, 603 (at p 605)

[2] Nitye Gopal v Nagendronath, (1885) 11 Calc, 429, Fernandez v Alves (1879) 3 Bom, 382

[3] Maharaja of Benares v Debi Dayal, (1880 1) 3 All, 575

[4] Nirmal Chunder v Saratmani Debya, (1898) 25 Calc, 911.

[5] Korban Ali v Sarodā Prosod Aich, (1884) 10 Calc, 82 (p 84); Swamirao v Kashinath, (1891) 15 Bom, 419, Balaji Ganesh v Sabharam (1893) 17 Bom, 555.

[6] Sec 3 cl 24 of the General Clauses Act 1897.

[7] See Report of Special Committee. Notes on clauses.

The Central Provinces Civil Courts Act 1885
The Lower Burma Courts Act 1900
The Punjab Courts Act 1877
The Oudh Civil Courts Act 1879

Application of the Code to Revenue Courts

5. (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, with the previous sanction of the Governor General in Council, may by notification in the *local* official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the local Government, with the sanction aforesaid, may prescribe

(2) "Revenue Court" in sub section (1) means a court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature

Act XIV of 1882 sect 4A This section applies to H C

Revenue Court—Generally speaking, Revenue Courts are Civil Courts within the meaning of the Code,[1] and its provisions govern the Revenue Courts of the N W Provinces in those matters upon which the Rent Act is silent [2]

Certain Acts are complete codes—Act X of 1859 is a complete code in itself and therefore neither the provisions of the Limitation Act [3] nor those of the Civil Procedure Code apply to cases under Act X of 1859 [4] The provisions of the Code of Civil Procedure do not apply to proceedings under the Rent Recovery Act (Madras Act VIII of 1865) [5] The Provisions of the Limitation Act XV of 1877, do not apply to a suit for profits under s 93 (*a*) of the N W P Rent Act, (VII of 1881),[6] or to a suit to set aside a distraint brought under the Rent Recovery Act (Madras) 1865 [7] The Registration Act is also a complete Code to which the provisions of the Limitation Act do not apply [8]

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[1] Nilmoni v Taranath, (1883) 9 Calc, 295; L R 9 I A 174, Naresh Kumari v Raghu (1886) 12 Calc, 50
[2] Madho Prakash v Murli, (1883) 5 All, 406, Fahimunnissa v Ajudhia, (1884) 6 All, 170
[3] Poulson v Madhu Sudan (1865) 2 W R Act X, 21 Annada Pershad v Krishna Kumar, (1874) 15 B L R, 60, note, 19 W R, 5, Nagendro Nath v Mathura Mohan (1891) 18 Calc, 368
[4] Padma Madhab v Lakhi Narain (1894) 21 Calc, 428, Mokundo Ballabh v Bhogoban Chandra (1894) 21 Calc, 514 Harish Chandra v Ananta Charan, (1897 98) 2 Calc W N, 127
[5] Velli Periya v Moidin Padsha (1886) 9 Mad, 332, Venkatanarasimha v Suranna, (1894) 17 Mad, 293
[6] Muhammad v Muzaffar, (1899) 21 All 22
[7] Sambasiva v Ramasami (1899) 22 Mad, 179
[8] Veeramma v Abbiah, (1895) 18 Mad, 99 Appa Rau v Krishnamurthi, (1897) 20 Mad, 249

6 Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction

Pecuniary Jurisdiction

This section applies to H C

The provisions of sections 6 and 7 of Act XIV of 1882 are covered for the most part by section 4 but the last paragraph of section 6 is reproduced here, definitely restricting the jurisdiction of Civil Courts within the pecuniary limits defined by their Charters or Acts of Constitution

Or proceedings in suits—These words were inserted in the draft Bill to settle the question whether a Court to which a decree is sent for execution has jurisdiction to execute it when the amount exceeds the pecuniary limits of the jurisdiction

Under Act XIV of 1882, the Madras High Court answered this question in the affirmative,[1] and the Calcutta authorities in the negative[2] The latter view was adopted in the draft section and specially noted by the Committee in their Report The omission from the section as ultimately published has not been explained

7 The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, *that is to say* —

Provincial Small Cause Courts

(*a*) so much of the body of the Code as relates to—

(*i*) suits excepted from the cognizance of a Court of Small Causes,

(*ii*) the execution of decrees in such suits;

(*iii*) the execution of decrees against immoveable property, and

(*b*) the following sections, that is to say,—

section 9,

section 91 and 92,

sections 94 and 95 so far as they relate to injunctions and interlocutory orders, and

sections 96 to 112 and 115

This section reproduces in a concise form the provisions of section 5 and Schedule II of Act XIV of 1882

Section 3 of the Provincial Small Cause Courts Act (IX of 1887) is repealed by this Act, so far as it affects "any local law or any special law other than the Code of Civil Procedure"[3]

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[1] Narasayya v Venkata Krishayya (1884) 7 Mad, 397, Shanmuga v Ramanathan, (1894) 17 Mad, 309

[2] Gokul Kristo v Aukhil Chunder, (1889) 16 Calc., 457, Durga Charn v Umatara, (1889) 16 Calc, 465 see also Shri Sideshwar v Shri Harihar, (1888) 12 Bom, 155

[3] See Schedule V post

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[4] Radha Madhab v Lakhi Narain (1894) 21 Calc, 428 Mokundo Ballabh v Bhogobon Chandra (1894) 21 Calc 514 Harish Chandra v Ananta Charan (1897 98) 2 Calc W N 127

[5] Velli Periya v Moidin Padsha (1886) 9 Mad, 337, Venkatanarasimha v Suranna, (1894) 17 Mad, 298

[6] Muhammad v Muzaffar (1899) 21 All 22

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[3] See Schedule V post

Section 17 of the same Act is utilized (see section 158 post) to apply this section to Provincial Small Causes Courts, and the result is that the entire Code applies to such Courts with the exceptions above specified.

Suits excepted. These are set out in the second Schedule to Act IX of 1887, and include suits instituted under O. XXI, rr. 62 and 63 or section 73.

The provisions for the bringing of suits relating to public nuisances and to public charities are expressly excluded (section 91).

Section 9. The jurisdiction of these Courts is defined by Chap. III of Act IX of 1887.

Sections 96-112 relate to Appeals and section 115 to Revisions.

Presidency Small Cause Courts.

8. Save as provided in sections 24, 38 to 41, 75, clauses (*a*), (*b*) and (*c*), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

Section 24 relates to the transfer and withdrawal of suits. Sections 38 to 41 to the transfer of decrees for execution, sections 75-77 to the issue of commissions, and sections 155-158 to amendments and repeals.

The Provisions in the body of this Code.—The rules in the first Schedule hereto are not excepted by this section. The High Courts have power to make rules prescribing the practice and procedure of the Small Cause Courts within their jurisdiction[1] and it is left open to them to apply these rules or such of them as may be found convenient.

[1] Act I of 1895, sec. 5.

PART I.

SUITS IN GENERAL.

JURISDICTION OF THE COURTS AND RES JUDICATA

Courts to try all civil suits unless barred

9 The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is *either expressly or impliedly* barred

Explanation — A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies

This section applies to H C but not to Prov S C C It reproduces sect II of the Old Code, with the addition of the words "*either expressly or impliedly*," thus overruling the suggestion that only an express enactment such as Act II of 1886, sect 39 and Act IX of 1890 sect 41, could so bar the cognizance of the Courts [1] Section 10[2] of Act XIV of 1882 reproduced from Act XV of 1836, has been omitted from this Code as unnecessary [3]

A Munsif is not debarred by Act IX of 1861 from entertaining a regular su t by a Hindu father for possess o i of his minor son[4] nor was an ordinary Civil Court prevented by s 265 of the Contract Act from trying a suit for dis solution of partnership [5] But when it has been decided that land is service inam land, then the Civil Court is barred by s 4 (*i*) of Bombay Act X of 1876, (the Bombay Revenue Jurisdiction Act) from having jurisd ction over plaintiff's claim against Government in respect of the trees growing on such land, as such claim relates to property apperta ning to the office of a village officer [6]

Since Bombay Act III of 1874 came into force, no suit will lie in a Civil Court for declaration that falling within the scope of th tion that they were entitle participate in the profits of of 1874 the Civil Courts had

[1] Kishorimohan v Chunder Nath (1887) 14 Calc , 646

[2] Report of Special Committee notes on clauses

[3] 'No person shall by reason of his descent or place of birth be in any civil proceeding exempted from the jurisdiction of any of the Courts' See Hem chand v Azam, (1905) 10 C W N , 361

[4] Krishna v Reade, (1886) 9 Mad , 31

[5] Ramjiwan Lal v Chand Mal, (1885) 7 All , 227

[6] De Souza v Secretary of State, (1894) 18 Bom , 319

[7] Chinto Abaji v Lal smi Bai (1878) 2 Bom 375 Khando Narayan v Apaji Sa lasi, (1878) 2 Bom , 370 Parsha v Lagmya, (1889) 13 Bom , 83, Naro Pandurang v Mahadev, (1888) 12 Bom , 614

[8] Bhiva v Vithya, (1901) 25 Bom , 186

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Since Bombay Act III of 1874 came into force, no suit will lie in a Civil Court for declaration that a person is eligible to officiate as a hereditary officer falling within the scope of that Act When plaintiffs sued to obtain a declaration that they were entitled to a third share in a *Mhirki Vatan* and to participate in the profits of the Vatan it was held that under Bombay Act III of 1874 the Civil Courts had no jurisdiction to make the declaration sought[8]

[1] Kishorimohan v Chunder Nath (1887) 14 Calc, 646

[2] Report of Special Committee notes on clauses

[3] No person shall by reason of his descent or place of birth be in any civil proceeding exempted from the jurisdiction of any of the Courts See Hem chand v Azam (1905) 10 C W N 361

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[6] De Souza v Secretary of State (1894) 18 Bom, 319

[7] ...

[8] Khando Narayan v Apaji ... mya (1889) 13 Bom, 83, Naro

In the United Provinces, by ss 134 and 241 of the Land Revenue Act, (XIX of 1873) some matters have been excluded from the jurisdiction of the Civil Court So a suit by a co sharer in a joint zemindari estate for partition and possession of his proportionate share of an isolate plot of land is not maintainable [1] A suit by a zemindar to compel the purchaser of a *putni* in his estate, sold for arrears of rent to furnish security for the amount of half the annual jumma is not maintainable his remedy being as provided by ss 5 and 7 of Regulation VIII of 1819 [2] S 4 of the Pensions Act XXIII of 1871 bars a civil suit against Government upon an alleged agreement by it to pay money from its Treasury [3] A suit for declaration that a political pension is partible is barred, [4] as also a suit by a hereditary *deshmukh* relating to grant of Land Revenue [5] and a suit against Government to recover possession of *inam* lands with arrears of cash allowances annually paid from the Government Treasury [6] as also a suit for r[illegible]

[illegible]

and SPECIFIC REMEDY, *infra*

Suits of a Civil Nature For a definition of the word suit see note to section 2 (2 p 7 supra Many cases were decided under Act XIV of 1882 as to what suits were maintainable as suits of a civil nature within the meaning of the section here reproduced The value of these decisions will be little diminished under this Code and they are grouped under heads arranged alphabetically as under for easier reference

Account stated —By English law an account stated even though it amounts to nothing more than totalling up of the items adding interest and acknowledging their correctness can be directly sued upon the claim lies where there is an absolute acknowledgment made by the defendant of a debt due by him to the plaintiff [9]

For the purpose of extending the period of limitation Act XV of 1877 Art 64 requires an account stated to be in writing and signed by the defendant and suits upon settlements not complying with these provisions have been dismissed by the Madras and Calcutta High Courts [10]

In dealing with a suit upon a razukhata or account stated the Bombay High Court has held [11] that such an acknowledgment unsupported by evidence of a contemporaneous oral contract founded on consideration cannot be sued upon as a fresh contract being only evidence of the original debt Neither in this judgment nor in the authorities followed is any reason assigned for the opposition to the long established view that such an account stated is an unequivocal admission of a debt, from which the law implies, as in England, a promise to pay, and thus except for limitation purposes, becomes a cause of action in itself But even these decisions do not affect the maintainability of a suit upon an account stated where in addition to the adjustment of accounts the plaintiff

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[1] Ijrail v Kanhai (1888) 10 All 5

[2] Joy Kishan v Jankee Nath, (1872) 17 W R 470

[3] Mansuru v Government of Bombay (1880) 4 Bom , 443

[4] Ram Chandra v Sakharam, (1878) 2 Bom , 346.

[5] Naro Damodar v Collector of Poona, (1882) 6 Bom 209

[6] Shivram Dinkar v Secretary of State, (1887) 11 Bom , 222

[7] Rama v Subba (1889) 12 Mad , 98

[8] Sultan Sani v Ajmodin, (1893) 17 Bom , 431

[9] For the definition of a Suit for accounts see Randura v Kumbabala (1905) 28 Mad , 394

[10] Buck v Hurst, L R 1 C P 297 and see Bullen and Leake on Pleading 6th Ed 70 71

[11] Amthu v Muthayya, (1893) 16 Mad , 339, Dukhi v Mahomed, (1894) 10 Calc., 296

alleges and proves an oral agreement to pay the balance due with interest[1] ... on each side creating ... nsactions which created ... rely complete or partial

Pleading.—Wherever the plaintiff desires an account it should be asked for in the plaint an omission to do so may be fatal to his claim in that respect[3]

Agency Courts.—As to appeals in suits heard by the Agency Courts of the Kathiwar State, see the under noted case[4]

Agreement.—No action will lie to recover the rent of lodgings knowingly let to a prostitute to carry on her vocation there[5], though prostitution is recognised and legalized by Hindu law[6], nor for money lent on an agreement to get a divorce and marry the lender[7], nor for future cohabitation[8], nor to recover ...

... of the defendant[13], nor on an agreement to pay a tax prohibited by an Act of the Legislature[14], nor upon breach of an agreement which has reference to social and religious customs[15] nor to enforce a penalty by which the defendant contracted to remain for ever in a particular community of which the plaintiffs were members[16]. But an action will lie for a breach of an implied contract to repay money lent independently of any security which may have been given for the advance[17]. A suit to recover money lent for gambling is maintainable, where gambling is not prohibited by law,[18] and an agreement is not necessarily unlawful, where two or more persons contract not to bid against one another at an auction sale[19]

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1 Baldeo Singh v Sheodan Punjab Rec No 20 of 1883, and see Melvill J, in Amritlall v Maniklal 9 Bom H C Rep 375

2 ...

3 ...

4 Devchand v Chotamlal, (1906) 33 Cal, 219

5 Gaurinath Mukerjee v Madhumani, (1872) 9 B L R, App 37 18 W. R, 445

6 Chalakonda v Chalakonda 2 Mad, H C, 56 but see Khubchand v Beram, (1889) 13 Bom, 150

7 Bai Vijli v Nansa (1886) 10 Bom 152

8 Vallance, in re 26 C D 353

9 Ooduy Chund v Palmer & Co, 3 S D A, Sel, 14

10 ... Oakes v Jackson, Act IX of 18.. Mackenzie, (18..

11 Vaithelinga v Saminada, (1878 81) 2 Mad 44

12 Vaithyanatham v Gangarazu, (1894) 17 Mad, 9

13 Sashannah Chetti v Ramsamy 4 Mad H C, 7

14 Puroshatamji v Robb, (1884) 8 Bom 398.

15 Huro Nath v Nitto Paramanick (1874) 22 W R, 517

16 ...

17 ... c f. Hari Baplunat ...

18

19

Illegal contract—Money paid under an illegal contract cannot be recovered [1] A promissory note given to the plaintiff in consideration of his withdrawing his threatened opposition to the discharge of an insolvent and consenting to an arrangement among the general body of creditors, whereby the plaintiff was to obtain a special advantage, cannot be sued on, as the contract is illegal [2] A suit will lie to set aside on the ground of duress and agreement by a zamindar for surrender of his *ni* land [3] A mortgage entered into for the purpose of carrying out the illegal purposes of an association, the formation of which is forbidden under the Indian Companies Act is an illegal transaction and a suit upon it must fail [4] An agreement is not illegal whereby a number of persons subscribe each a certain sum by periodical instalments with the object that each in his turn (to be decided by lot) shall take the whole subscription for each instalment all such persons being returned the amount of their contributions the common fund being lent to each subscriber in turn

Marriage—A suit will lie for the consideration of a marriage among Hindus[5] for a declaration that an alleged Hindu marriage is invalid[7] also for an injunction restraining parents from marrying their daughter to other than plaintiff[8] But no suit will lie on a contract entered into by Hindus by which it is agreed that on the happening of a certain event a marriage is to become null and void [9] But a contract by a Muhammadan with his first wife not to marry a second is not illegal [10] Nor is authority granted to divorce him, if he either marries again or he violates any condition of the marriage contract [11] Nor will a suit for specific performance of an agreement to marry lie,[12] though one for damages against a guardian for breach will [13] but a contract to marry a minor on payment of a consideration is void [14] A contract which entitles a father to be paid money in consideration of giving his son or daughter in marriage is against public policy and cannot be enforced in a Court of law [15] A suit for restitution of marriage will lie in a Civil Court in British India [16] A suit for dissolution of marriage under Act IV of 1869 will not lie when the parties have been married under the rites of Hindu law [17] See 'RESTITUTION OF CONJUGAL RIGHTS,' *infra*

Subscription—See Kedar Nath v Gorie Mahomed [18]

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[1] Kearley v Thomson, 24 Q B D 742

[2] Krishnappa v Adimula (1897) 20 Mad 84

[3] Daulat Ram v Anwar Husen (1893) 20 All 211

[4] Madras Hindu Benefit Fund v Ragava (1896) 19 Mad 200 see also Ramasami v Nagendrayyan, (1896) 19 Mad, 31 c f Panchena v Gadinhare, (1897) 20 Mad 68

[5] Vasudevan v Mammod (1899) 22 Mad 212 *Unconscionable agreement*—See Chunni Kuar v Rup Singh (1889) 11 All, 57, Kamini Soondari v Kali Prosunno L R, 12 I A 215 Fry v Lane 40 C D 312, Nevill v Snelling 15 C D 679 The Rialto, 1 P D, (1891), 175, Toke Indar v Rup Singh (1889) 11 All, 118

[6] Viswanathan v Saminathan, (1890) 13 Mad, 83

[7] Aunjona Dasi v Prahlad Chandra (1870 71) 6 B L R 243

[8] Venkatachacharyulu v Rangacharyulu, (1891) 14 Mad, 316

[9] Sitaram v Aheeree, (1872 3) 11 B L R 129

[10] Hurron v Khyroollah, Fulton, 361

[11] Hamidoollah v Faizunnissa (1882) 8 Calc 327

[12] Umed Kika v Nagindas, 7 Bom H C, 122, Bhugun v Ramjan, (1875) 24 W R, 380

[13] Mulji v [illegible]

[14] Dulari [illegible] 1884] 10 C [illegible]

[15] Dholid [illegible] riage void [illegible]

[16] Azmat [illegible]

[17] Thapita [illegible]

[18] Kedar [illegible]

Criminal Proceedings.—A suit. A suit will not lie on a contract affecting the course of justice, such as to obtain the release of a *badmash* by killing the Police officer in whose charge he is[1] nor to hush up a case and suppress criminal prosecution for a consideration[2], otherwise, if the contract be to forego a prosecution in a case in which though a compromise could not be legally effected, it had been allowed by the Magistrate[3] or it is to compound criminal proceedings in a foreign country for an offence committed there, and the law of the country permits the transaction[4]. Where the defendant agreed *to execute a kobala of certain lands in favour of plaintiff in consideration of the* latter's abstaining from taking criminal proceedings against the former with respect to an offence which is compoundable, such a contract cannot be regarded as forbidden by law or against public policy and may be enforced[5] but the contract would be void, if the offence was not compoundable[6].

Cesses.—Nor can a contract be enforced for or about any matter prohibited or made unlawful by Statute thus, where certain farmers agreed to pay over and above the jummas such sums as would be realized under the head of *tibiti bitti*, and were sued for these sums by the zemindar it was *held* that the stipulation was illegal and opposed to s 3 Regulation V of 1812 and the suit was dismissed[7]. So an agreement to pay the *purabi* collected from the village has been declared illegal under s 10 Act X of 1859[8]. Nor will a suit lie against a tahsildar to account for money 'exacted' in excess of the rent, otherwise, if the payment had been made voluntarily[9]. But where the *talab beshi* has been paid voluntarily for several years, and has been incorporated in ... the subject of one receipt the cess not ... the North West it has been held that a ... by Regulation VII 1822 is not maintain... his right to a cess and ... to record it[10]. A suit ... levied as tax under the ... ising out of the privilege ... urt[14]. So also is a suit for collection charges from a tenant, if the condition is definite and forms part

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[1] Protima v Dukhi Sirkar (1891 2) 9 B L R App 38

[2] Jeetoo Mahato v Mone ram (1872) 17 W R 84 Kandas Chetti v Coorjee Mad H C 187 Rajkristo v Koylash Chunder, (1882) 8 Calc, 24, Campbell, in re 14 Q B D 32

[3] Nubbee Buksh v Hingan (1867) 8 W R 412 see also Kamala Nath v Beharee Kant (1869) 11 W R 314

[4] Subraya Pillai v Subraya 4 Mad H C 14

[5] Amir Khan v Amir Jan (1898 9) 3 Calc W N 5

[6] Shirangachariar v Ramasami (1895) 18 Mad, 189

[7] Radha Mohun v Gunga Pershad 7 S D A, Sel 163

[8] Kamala Kant v Kalu Mahomed (1869) 3 B L R A C 44, 11 W R 395 Sonnum Sookul v Ilahee Buksh (1867) 7 W R 453

[9] Nobin Chunder v Gooroo Gobind (1870) 14 W R, 447 (1896) 25 W R 8

[10] Serajgunge Jute Co v Torahlee (1876) 25 W R 252 Assanulla v Tirthabashini (1895) 22 Calc
(1899) 26 Calc 611 see also
W N 543 not so—Tilu
(1890) 17 Calc 131 L R 1
See also s 74 Act VIII of 1885

[11] Khyrat Ali v Mohomed Yaseen Khan 1 Agra 207 Bisharut v Seetul Misser, 1 All H C 40

[12] Mahomed Ali v Oomarao Singh, 2 All H C, 425, Akbar Khan v Sheoratan (1876 8) 1 All, 373

[13] Narayan v Sakharam (1885) 9 Bom, 462

[14] Hurish Chunder v Gopal (1865) 3 W R, Act X, 158

of the consideration of the lease[1], but a cess leviable in accordance with village custom, which is not recorded under the general or special sanction of Government, cannot be recovered in a Civil Court[2]. A cess cannot, in the absence of any contract, be levied by a Government lessee from a *jotedar*, who grazes his cattle on his own jote[3].

Champerty and Maintenance.—No suit will lie on a contract having the qualities attributed to champerty or maintenance in English law, something against good policy and justice tending to promote unnecessary litigation and in a legal sense immoral, and to the constitution of which a bad motive is in the same sense necessary,[4] and not *bona fide* entered into merely to obtain an interest in the litigation but an unfair, illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families, and carried on from a corrupt and improper motive[5]. So a contract made to assist another in carrying on litigation against a third party out of spite and ill feeling to such a third party is against public policy[6], but not a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered[7], or, where the consideration is not a share but a lease of the property[8]. Where an ignorant suitor was under an apprehension of losing his suit from the false colour given to it by his attorney, who represented the necessity of making a bargain with a more favoured client and this bargain was of a most oppressive kind for a division of a fund which must have been recovered and in which the plaintiff really risked, and the attorney knew he really risked nothing. *Held* the contract could not stand for more than *bona fide* advances[9]. Plaintiff had alienated certain property to defendant for the purpose of defrauding his son. The alienation was successful in defeating an attachment made by one of plaintiff's creditors, yet he was held entitled to recover, on showing the real nature of the transaction[10].

A speculative purchase, though not champertous, is not contrary to public

[1] Mahomed Fayaz v. Jamoo, (1882) 8 Calc., 730.

[2] Lala v. Hira Singh, (1879) 2 All., 49.

[3] Bhageeruth v. Ram Narain, (1868) 9 W. R., 299.

[4] Fischer v. Kamala Naicker, (1865) 3 W. R. P. C. 33, 8 Moo. I. A., 170, Ramrav Khanderav v. Govind, 6 Bom. H. C., A. C. J., 63.

11 All., 128.

[6] Bamun Das v. Huro Lall, (1868) 10 W. R., 140.

[7] Ram Coomar Coondoo v. Chunder Kanto Mookerjee, L.R., 4 I. A., 23, (1877) 2 Calc., 233; (1876-8) 13 B. L. R., 530. Muniakhan Singh v. Bholoy, (1869) 12 W. R., 137; Jugmohun Lall v. Buddun Koer, (1868) 9 W. R., 243; Damodhar v. Kabandas, 8 Bom. H. C., 1, Mohkam Singh v. Rup Singh, (1893) 15 All., 352, L. R. 20 I. A., 127.

[11] ... 72; Ramanuja v.

[12] Raghu Nath v. Nil Kanth, L. R., 20 I. A., 112; (1890) 20 Calc., 843.

[13] Debi Dayal v. Bhan Pertap, (1904) 31 Calc., 433.

estate was well founded, advanced the funds necessary to enable him to prosecute a successful appeal to the Privy Council, and the Allahabad High Court held that the reward stipulated for was in the circumstances excessive and unconscionable *Held* that such a decree would not be reversed unless shown to be clearly wrong [1] But an assignment to the plaintiff with a view to litigation is not maintainable [2] When a person joins with the other plaintiffs under an agreement that he should defray the expenses of the suit from the Court of first instance up to the Privy Council, he has no right to join in the suit [3]

Assam Regulations—The term "property" in s 70 of the Assam Land and Revenue Regulation (I of 1886) includes an entire estate as well as a share in respect of which revenue has been separately apportioned, so, in a case where revenue in respect of certain lands had been separately apportioned and arrears fell due in respect of the remaining portion of the taluk, and the taluk, *minus* those lands, was put up to sale and purchased by the plaintiff, *held* that the plaintiffs were entitled to maintain a suit to avoid an incumbrance [4]

The question of the right of a party to obtain a settlement is not excluded from the jurisdiction of the Civil Court by provisions of s 154 of the Assam Land and Revenue Regulation [5] A plaintiff is entitled to maintain a suit for a declaration that his rights are not affected by an order of the Collector under s 65 of the Assam Land and Revenue Regulation, specifying the revenue payable by the defendant and made without notice to the plaintiff [6] When a suit was brought for the partition of an estate excluding certain portions as *brahmutter* or *debutter* or as being held jointly by third persons, *held* that the jurisdiction of the Civil Court was barred by s 154 of the Assam Regulation (I of 1886)[7] So a suit for an imperfect partition of an estate in Assam is barred [8]

Award—A plaintiff may sue to enforce an award when the matter was referred to arbitration without the intervention of a Court of Justice S 523 of Act XIV of 1882 (Art 17, Sch II of this Code) is no bar to his doing so [9]

Benami Transaction—A suit does not lie for a declaration that a conveyance executed by a plaintiff is a *benami* and fictitious transaction, when the alleged transaction has been used to accomplish the fraudulent purpose for which it was intended[10]

Burial Ground—Where certain Mahomedans of a village brought a suit against other Mahomedans of the same village for the removal of a wall built by the defendants upon land which was found to belong in common to all the Mahomedan inhabitants of the village for the purpose of a burial ground, it was held that the suit was maintainable [11]

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[1] Makham Singh v Rup Singh L R 20 I A 127 (1893) 15 All, 352 See also Siva Ramayya v Ellamma (1899) 22 Mad, 310 in which it has been held that the mere fact that a suit is speculative does not render it champertous

[2] Gokuldas v National Financial Co (1879) 3 Bom 402

[3] Hazari Lal v Jadaun Singh, (1883) 5 All, 76

[4] Mahomed Nasim v Kashi Nath, (1898 99) 3 Calc W N, 108

[5] Patan Mania v Bhabiram 24 Calc 239, (1896 97) 1 Calc W N, 94

[6] Loknath Das v Mahomed Bulbi, (1897 8) 2 Calc W N, cclxiv

[7] Sarat Chandra v Prakash Chandra, (1897) 24 Calc 751

[8] Abdul Khaliq v Abdul Khaliq (1896) 23 Calc, 514, but see, Gouri v Subanands (1905) 32 Calc, 1036 and 1 C L J, 421

[9] Subbaraya v Sadasiva, (1897) 20 Mad, 490

[10] [illegible] (1900) 27 C [illegible] 231 4 Calc W N, 289, Goberdhan [illegible] haran v Rasik Lall, (1896) [illegible] (1895) 18 Mad, 378 See

[11] Tamulin v Panda, (1894) 18 Bom, 699

Canal Dues—The Civil Court has no jurisdiction to entertain a suit by a proprietor to recover moneys wrongly taken from him as canal dues.[1]

Carriers—See the Carriers Act, (III of 1865) the Indian Railways Act, (IX of 1890) and the Indian Contract Act, (IX of 1872), ss. 151, 152 and 161. A suit will lie for damages against a Railway Company for the death of plaintiff's son that occurred in the Railway when travelling in it.[2]

Caste—A suit will lie for restoration to caste, and damages or compensation for cost of restoration to caste lost in consequence of the defendant having accused plaintiff of adultery.[3] So also a suit lies to gain re-admission to caste only,[4] and expulsion without a hearing is illegal. But though suits may be instituted for restoration to caste or to membership of religious associations, a suit will not lie to compel Hindus against their will to ask others to their houses and entertainments,[5] nor to obtain a declaration of a right to membership of a *Somaj* (society) upon the allegation that the other members have excluded the plaintiff *from it*, the exclusion neither deprived him of caste nor affected any right to property,[7] nor to enforce the performance of certain services by barbers on the ground of custom or established usage,[8] and a claim to be *chalvadi* of the *Lingayet* caste of Bagalkot in Bombay will not be entertained by the Civil Courts.[9] So a right to receive fees as head of a caste cannot be decided in the Bombay Civil Courts,[10] nor will a suit lie for damages because the plaintiff has not received a share in funeral gifts,[11] nor for recovery of half of certain vessels belonging to the caste or their value.[12] But the Civil Courts are not ousted of jurisdiction to try a suit for breach of contract or for possession of *caste property because it may be incidentally necessary to determine the* usages of the caste.[13] A court can determine whether plaintiff's expulsion from caste for violating caste rules is valid or not.[14] A suit to enforce caste rights and privileges and for an injunction restraining the defendants from preventing other members of the caste recognising and treating the

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[1] Balwant Singh v. Secretary of State, L. R. 30 I. A., 172: (1903) 8 Calc. W. N., 121, (1903) 25 All., 527.

[2] E. I. Railway Co. v. Kally Das Mukerji (1899) 28 Calc., 465: 3 Calc. W. N., 751. *As for the liability of carriers to be sued*, see Choutmull v. Rivers Steam Navigation Co., (1897) 24 Calc., 786, also (1899) 26 Calc., 398. Secretary of State v. Dipchand, (1897) 24 Calc., 306, Moheswar Das v. Carter, (1884) 10 Calc., 210. Muthoorakant Shaw v. India General Steam Navigation Co., 10 Calc., 166, India General Steam Navigation Co. v. Joykristo Shaw, (1890) 17 Calc., 39, *Irrawaddy Flotilla Co. v. Bugwan Das* (1891) 18 Calc., 620, Secretary of State v. Budhu Nath (1890) 19 Calc., 533, Tippanna v. Southern Maratha Railway Co., (1893) 17 Bom., 417, Raisett Chandmull v. Great Indian Peninsular Railway Co., (1893) 17 Bom., 723, also the same case in appeal (1895) 19 Bom., 165. Sesham Patter v. Moss, *(1894) 17 Mad.*, 445. Balaram v. Southern Marhatta Railway Co. (1895) 19 Bom., 159, E. I. Railway Co., v. Bunyad Ali, (1895) 18 All., 42.

[3] *Gopal Gurain v. Gurain, (1867)* 7 W. R., 299.

[4] Sontram Gazor v. Obhyram Gazor, 7 S. D. A., Sel., 344.

[5] Krishnasami v. Virasami, (1887) 10 Mad., 133.

[6] Joychunder Sirdar v. Ramchurn, (1866) 6 W. R., 325.

Sudharam Patar v. Sudharam, (1869) 3 B. L. R. (C. A.), 91, 11 W. R., 457, and the cases collected there, and see Hopkinson v. Marquis of Exeter, L. R., 5 Eq., 63, Raghunath v. Janardhan, (1891) 15 Bom., 599.

[8] Rajkisto v. Nobaee Seal, (1864) 1 W. R., 351.

[9] Shankara v. Hanma, (1878) 2 Bom., 470.

[10] Murar Daji v. Nagria, 6 Bom. H. C., A. C. J., 17.

[11] Maya Shankar v. Harishankar, (1886) 10 Bom., 661.

[12] Girdhar v. Kalya (1881) 5 Bom., 83.

[13] Mehta v. Jamnatram, (1888) 12 Bom., 225, Pragji v. Gobind, 11 Bom., 534.

[14] Krishnasami v. Virasami, (1887) 10 Mad., 133. As to defamation by a caste judgment, see Vallabha v. Madusudanan, 12 Mad., 495.

plaintiff as a member of the caste discloses no cause of action [1] As to the principles on which the Bombay High Court will enforce resolutions of the

nent of caste property and
Walji Wardhman [2] The
confined to Hindus An

agreement between members of a caste for paying off the debts of the caste out of contributions to the caste funds involves a caste question [3] A Civil Court has jurisdiction to enquire into the validity of a sentence of excommunication from caste, and it lies on the plaintiff who seeks to enforce the sentence and by virtue of it to deprive the defendants of their civil rights to prove that it was passed on justifiable grounds and after a fair and proper enquiry [4] But when a caste has excommunicated one of its members, acting in good faith, and has proceeded regularly according to custom the Civil Court cannot interfere or examine the question on its merits [5] Under Bom Reg II of 1827, s 21, cl 1, only such caste suits as claim damages for injury to caste or character of the plaintiff are maintainable But when a claim to property is involved, the regulation is no bar so far as that claim is concerned The Courts in that case have a distinct and separate jurisdiction, resting not on the caste dispute but on the claim to property [6] In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction, and exercises his jurisdiction with due care and in conformity t

guru as head of a
autonomy of caste acc
immoral in a caste
on mutual agreement, on one party paying to the other the expenses of the latter's original marriage [8]

Compensation —A suit by a purchaser of an estate sold for arrears of

d to him under s 2
the sale, will lie in a
wrongful seizure of
on for the loss of his

daughter's services on account of her abduction [11] A suit for damages will lie against a defaulting witness [1-] But no suit will lie unless summons to attend has been personally delivered [13] No suit will lie against a person who has not attended a feast (after accepting invitation) for the price of the food unconsumed on account of his absence [14] and no suit for damages is maintainable by one joint owner of an undivided estate against another when the estate has been sold through the default of one or more of such co sharers in paying their shares of the Government Revenue [15]

Contribution —The right to contribution, in the absence of contract, rests on the equitable doctrine that *in equali jure*, the law requires equality one shall

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1 Kanji Bavla v Arjun Shamji (1894) 18 Bom 115

2 Lalji Shamji v Walji Wardhman (1895) 19 Bom 507

3 Abdul Kadir v Dharma, (1896) 20 Bom , 190

4 Appaya v Padappa, (1899) 23 Bom 122

5 Keshavlal v Bai Girja, (1900) 24 Bom , 13

6 Nathu v Keshawji (1902) 26 Bom , 174

7 Ganapti v Bharati, (1894) 17 Mad 222

8 Sankaralingam v Subban (1894) 17 Mad , 479

9 Chuttu Lal v Bhagwati Prasad, (1896 97) 1 Calc W N , 447

10 Shuttrughon v Hokum (1889) 16 Calc 159 See also Venkatachala v Kuppusami (1888) 11 Mad , 42

11 Ram Lal v Tularam, (1882) 4 All 97

12 Dwarkanath v Anundo Chunder (1866) 5 W R (S C C Ref), 18

13 Dhunput Sing v Prem Bibi (1875) 24 W R 72

14 Kalu Haldar v Kyamuddi (1875) 23 W R 417

15 Parmesshur v Bissen Doyal, (1876) 1 Calc , 406

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1 Balwant Singh v Secretary of State L R 30 I A 172 (1903) 8 Calc W N, 121, (1903) 25 All, 527

2 E I R [illegible] Calc W N
781 [illegible] Rivers Steam
Navi[illegible], Secretary
of St[illegible]rter, (1884)
10 C[illegible] Navigation
Co [illegible] v Joykristo
Shaw[illegible] Das (1891)
18 Ca[illegible] Calc 538
Tipp[illegible] 17 Fawcett
Chan[illegible] Bom 723
also t[illegible]r v Moss
(1894[illegible] Co (1895)
19 Bom 159, E I Railway Co, v Bunyad Ali, (1896) 18 All, 4[illegible]

3 Gopal Gurain v Gurain, (1867) 7 W R, 299

4 Soniram Gazor v Obhyram Gazor, 7 S D A, Sel, 344

5 Krishnasami v Virasami, (1887) 10 Mad, 133

6 Joychunder Sirkar v Ramchurn (1866) 6 W R, 325
Sudharam Patar v Sudharam, (1869) 3 B L R (O C A) 91 11 W R, 457, and the cases collected there and see Hopkinson v Marquis of Exeter, L R, 5 Eq, 63, Raghunath v Janardhan (1891) 15 Bom, 599

8 Rajkisto v Nobaee Seal (1864) 1 W R, 301

9 Shankara v Hanma, (1878) 2 Bom, 470

10 Murar Daya v Nagria 6 Bom H C, A O J, 17

11 Maya Shankar v Harishankar, (1886) 10 Bom 661

12 Girdhar v Kalya (1881) 5 Bom 83

13 Mehta v Jamiatram, (1888) 12 Bom, 225, Pragji v Gobind, 11 Bom, 534

14 Krishnasami v Virasami (1887) 10 Mad, 133 As to defamation by a caste judgment, see Vallabha v Madusudanan 12 Mad, 495

persons jointly execute a bond, and on the expiration of the stipulated time only one of them executes a second bond, and the debt is subsequently paid off, the latter is entitled to sue all the debtors for contribution [1] Where a claimant having obtained possession of an estate under a decree has in good faith, paid the revenue and cesses, although the decree may have been reversed afterwards *and he may have been deprived of possession, he is nevertheless entitled to be* repaid by his opponent who benefits by it [2] When the payment is not voluntary and the plaintiff is interested in the payment, a suit for contribution will lie [3] A claim for contribution creates only a personal liability and does not create a charge on the estate [4] A suit for contribution by a partner against some of his co partners, on account of money paid by him for the satisfaction of a debt, contracted by him jointly with the said co partners is maintainable [5] When there is no endowment or trust to support an idol, no suit for contribution is maintainable for payments made on account of the expenses of the idol [6] The Courts trying the case can go into the facts of the previous litigation [7] The decree of the Appellate Court did not award mesne profits, but in execution the first Court realized them from plaintiff *Held*, he could not sue his co defendants for contribution, as mesne profits were not authorized by the decree [8]

Parties—In a suit for contribution all the parties interested should be made parties[9], and the plaint must set out the amount due by each party sued, otherwise it should be rejected [10]

Copy right—Calcutta High Court has jurisdiction to order entry in Bombay Registrar to be expunged [11]

Co-sharers—A co parcener in a joint Hindu family is entitled to claim *joint possession of a portion of the joint estate and need not sue for partition* [12] Where a co sharer sets up ferry at his own expense on the joint property, but does not dispossess the other co sharers or restrict their user of the land or ferry, they cannot obtain any relief by way of injunction, damages or accounts *of the profits, even though he denies their title* [13] There is no such *broad pro*

possession against any other until there has been a disclaimer of the latter's title [15]

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[1] Troyluckho Nath *v* Kashee Nath, (1870) 14 W R, 4o8

[2] Dakhina Mohun Roy *v* Saroda Mohun Roy, 21 (1894) Calc., 142

[3] Bindu Bashini *v* Hurendra Lal Roy, (1898) 25 Calc, 305, Radha Madhub *v* Sasti Ram, (1899) 26 Calc, 826

[4] Gopinath *v* Ishurchundra, (1895) 22 Calc, 800, Upendra Lal *v* Girindra Nath, (1898) 25 Calc 565

[5] Guda Kulita *v* Joyram Das (1899) 26 Calc, 262. But see, Durga Prosanna Ghose *v* Raghu Nath Dass, (1899) 26 Calc, 254

[6] Sham Lal *v* Huro Sunduree, (1866) 5 W R, 29

[7] Thangammal *v* Thyyamuthu, (1887) 10 Mad, 518

[8] Bunwaree Lall *v* Sudhist (1876) 25 W R, 269

[9] Khema Debia *v* Kumolakant, (1868) 10 W R, 10

[10] Bholanath *v* Indur Chand (1870) 14 W R, 373 but see, Ibn Husain *v* Ramdai, (1890) 12 All, 110

[11] Ismail *v* Aljbhai, (1905) 1 Calc L J, 278

[12] Ram Chandra *v* Damodhar, (1896) 20 Bom 467 Watson & Co *v* Ramchand, L R, 17 I A, 110, (1891) 18 Cal, 10 Mohesh *v* Newbart, (1905) 1 C L J, 437

[13] Luchmeswar Singh *v* Manowar Hossein L R 19 I A, 48 (1892) 19 Calc., 253

[14] Shamnugger Jute Factory Co *v* Ram Narain, (1887) 14 Calc, 189. See also, Joy Churder *v* Bipro Churn, (1887) 14 Calc, 236

[15] Ujalbi *v* Umakanta Karmakar, (1904) 31 Calc, 970, 9 Calc W.

Buildings.—In Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty,[1] it was laid down that when a permanent building has been erected by some or one of several co-sharers on the land jointly held, and another co-sharer seeks to have the building removed, the principle on which the Court acts is that, though it has a discretion to interfere and direct removal of the building, this is

being erected by a joint owner on land without the permission of his co-owners and even in spite of their protest is not sufficient to entitle such co-owners to obtain the demolition of such building unless they can show that the building has caused such material and substantial injury as could not be remedied in a suit for partition of the joint land. One co-sharer in a mahal is entitled to a perpetual injunction restraining another co-sharer from proceeding further with the erection of a building [illegible] him on partition and direct [illegible] pulled down and prohibiting [illegible] clusive owner at any future time. One of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners notwithstanding that the erection of such building may cause no direct loss to the other joint owners.[4]

Costs.—A suit will not lie for the costs of defending a possessory action under Act V 1864 (Bom.) or for costs incurred in resisting a claim under ss. 278, 279, 280 of Act XIV of 1882 (s. XXI, rr. 58, 59, 60 of this Code, Ref. Case, 3 Mad. H. C., 341), or for costs incurred in prosecuting a person for a criminal offence,[6]

[illegible]

and the assignment away of its assets [illegible] *held*, that the plaintiff was entitled to maintain the suit.[10] Where a decree for costs was assigned by the decree-holders, and the assignee took the costs out of court, it was held on the decree being reversed on appeal to the Privy Council that no suit would lie against the assignee for the costs so realized by him.[11] A civil suit will lie for costs incurred in appearing to give evidence in a proceeding under s. 145, Crim. P. Code.[12]

Court of Wards.—The High Court cannot restrain the Court of Wards, from interference in the bestowal in marriage of a minor.[13]

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1 Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty, (1882) 8 Calc., 708.

2 [illegible] But see also, Fazilatunnessa v. Ijaz [illegible]

3 [illegible]

4 [illegible] Kanakayya v. Narasimhulu, (1897) 19 Mad., 38.

5 [illegible]

6 [illegible]

7 [illegible]

8 [illegible] Salig Ram, (1887) 9 All., 424.

10 [illegible]

11 [illegible]

12 [illegible]

13 [illegible] W. N., 718.

Decree ... n regard to execution of decrees, ... he cannot bring a regular suit ... ver appointed during execution,[1] ... xecution is barred by limitation, he cannot revert to a regular suit[2] After a foreclosure decree no second suit to redeem will lie in Bombay, if there is no foreclosure clause in the decree, otherwise in Madras[3] A second suit will lie if the decree is one for partition, and the second suit is for a declaration of a right to partition,[4] or the first suit is for money against A, and the second is to establish a right to execute against property in the hands of a third person on equitable grounds,[5] or the decree is such as is not capable of being executed, such as a final foreign decree,[6] if defendant has not been served in the original suit, or a decree namely declaratory,[7] or if it is partly declaratory, a suit will lie on that part,[8] but if a decree is not merely declaratory, a second suit will not lie, even though it is so vague as to be incapable of execution[9] Plaintiff brought a suit for possession on a contract of sale and obtained a decree against his vendor, a mortgagor, who had sold to him his right, title and interest Plaintiff never took out execu ...

[illegible]

where the purchaser[11] and the assignee of a purchaser at a sale in execution were not put in possession in the execution proceedings, they were allowed to sue for the property,[12] and the same rule applies if the decree holder or his assignee only gets symbolical possession instead of *khas*,[13] otherwise if the suit is not brought against a party to the original decree, but his lessee having a permanent interest in the soil[14] Moneys realized as due under a decree, or realized improperly from a party to the suit are recoverable by application to the Court executing the decree, and not by regular suit[15]

Suit on Decree—In Calcutta, a suit may be brought in the High Court on a decree of the High Court[16] In Madras, a suit will lie on the decree of a

[1] Mahomed v Jussodalal, W R, 1864, p 247 c f Mirza Mohomed v Widow of Balmakund, L R, 3 I A, 241, Fakirapa v Pandurogapa, (1882) 6 Bom, 7

[2] Anrudh Singh v Sheo Pershad, (1882) 4 All, 481, Hari Ravji v Shapurji, L R 13 I A 66, but see Muhammel Samiuddin v Mannu Lal, (1889) 11 All, 386, Jawitri v Emile, (1891) 13 All, 98

[3] Chudasama v Ishwargar, (1892) 16 Bom, 243, p 248

[4] Nasratullah v Mujibulla, (1891) 13 All, 313

[5] Gooroo Das Pyne v Ram Narain, L R 11 I. A, 59.

[6] Nouvion v Freeman, 37 C D, 244

[7] Eduljı v Manekji, (1887) 11 Bom, 241, Vanayak v Abaji, (1888) 12 Bom, 416, Srikrisnna v Singara, (1882) 4 Mad, 219

[8] Sabhanatha v Subba, (1884) 7 Mad, 80

[9] Venkanna v Aitamma, (1889) 12 Mad, 183, and see Ashutosh Bannerjee v Lukhimoni, (1892) 19 Calc, 139

[10] Jugur Nath v Balgobind, 1 N W P, Pt 1 p 59, edit 1869, p 154 edit 1873 and 1 All H C, 105, Isvar Pershad v Jainaran, (1886) 12 Calc, 169, Shankar Bisto v Narsingrav, (1898) 22 Bom, 667

[11] Kishori Mohun v Chunder Nath, (1887) 14 Calc, 644

[12] Sreu Mohun v Bhagoban, (1883) 9 Calc, 602

[13] Joggobundhu v Purnanund, (1889) 16 Calc, 530, Sevu v Muttusami, (1887) 10 Mad, 53

[14] Dalmar Puri v Bipin Bihari, (1891) 18 Calc, 520

[15] [illegible]

Mookoond v Mahomed, (1887) 14 Calc, 484

[16] Attermoney Dassee v Hurry Doss, (1881) 7 Calc, 74

Native Court [1] It is doubtful if a new suit will lie upon a decree pending appeal [2] or barred by limitation [3] A suit will not lie in a Small Cause Court on a Civil Court decree [4] nor will a regular suit lie on a rent decree of the Revenue Court [5] but a suit will lie in the Bombay High Court on a Small Cause Court decree [6]

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Decree not tainted with fraud—If a decree is not tainted with fraud, no suit lies to set it aside [8]

Mistake—A suit lies to rectify a mistake in a decree [9]

Assignment of Decree—A suit lies at the instance of the assignee of a decree for a declaration of the validity of his assignment [10]

Mortgage—When the mortgagee of a house has obtained a decree against the mortgagor and a purchaser from him subsequent to the mortgage, a suit will lie against the latter, but not in a Small Cause Court, for diminishing the security by taking away the materials of the house [11]

Probate &c—A suit did not lie to set aside a certificate granted under Act XXVII, 1860 [12] though one for declaration of title to be used as a reason for asking the certificate to be withdrawn was admissible [13] So a regular suit will not lie to set aside an order granting probate of a will, the grant must be contested by an application to revoke in the Court of Probate, [14] unless possibly for fraud or want of jurisdiction [15] but a judgment creditor who has attached, if the will is set up in fraud of creditors, [16] or a mortgagee of the nearest of kin, [17] or in Bengal the widow of a Hindu leaving sons, [18] may apply for revocation, but no person can do so who has taken part in the probate proceedings, his

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[1] Kaliyugam v Chokalinga, (1884) 7 Mad, 105, Sama Rayar v Annamalai, (1884) 7 Mad 164, otherwise, in Bombay—Himmatlal v Shivajirai, (1884) 8 Bom, 593, c f Sakharam Dikshit v Ganesh, (1879) 3 Bom, 193 See s 14

[2] Imamun v Hurdyal, (1866) 5 W. R, 276

[3] Fakirapa v Pandurangapa (1882) 6 Bom, 7, see however, Attermoney Dossee v Hurry Doss, (1881) 7 Calc, 74

[4] Manchharam v Bakshee Saheb, 6 Bom H C, 231, Merwanji v Asabai, (1884) 8 Bom, 1

[5] Ananda Moyi v Patit Pabani, (1863) B L R, (F B) 18

[6] Merwanji v Ashabai, (1884) 8 Bom, 1, p 12, Act XV of 1882, s 94, otherwise in Calcutta—Golam Arab v Curreem Bux (1880) 5 Calc, 294

[7] Varadarajulu v Srinivasulu, (1897) 20 Mad, 333 See Fraud infra

[8] Sadhu Misra v Golap Singh (1896 7) 1 Calc W N, cc referred to in Chand v Srimati Asmat, (1906) 10 C W N, 1024, Pran Nath v Mohesh Chandra, (1897) 24 Calc, 546, Ram Narain Tewari v Shew Bhanjan, (1900) 27 Calc, 197, Dwarka Persad v Luchhoman Das, (1899) 21 All, 289, Lachmi Dayal v Har Danni Lal (1903) 25 All, 347 See Fraud, infra

[9] Jogeswar Atha v Ganga Bishun, (1903 4) 8 Calc W N, 473

[10] Bommanapati v Chintakunta, (1903) 26 Mad, 264

[11] Omer Kurim v Shewan Lal, (1879) 4 C L. R 291

[12] Roghoobur Dyal v Ram Narain, (1874) 22 W R, 312

[13] Russick Chunder v Ram Lall, (1874) 22 W R, 301

[14] Mayho v Williams, 2 All H C, 268

[15] Komollochun Dutt v Nilruttun, (1879) 4 Calc, 360, 4 C. L R, 175

[16] Umanath Mookhopadhya v Nilmoney Singh, (1881) 6 Calc, 429, (1884) 10 Calc, 19, L R 10 I A, 80

[17] Nobeen Chunder Sil v Bhobo Soondari, (1881) 6 Calc, 460, Surbomongala v Shashibhooshun, (1884) 10 Calc, 413

[18] Brinda Chowdhrain v Radhica, (1885) 11 Calc, 492

remedy is, possibly by [illegible] nistration made by a D [illegible] it was held that the cause of [illegible] tion to entertain a fresh app[illegible]

Existing Decree—A decree [illegible] reversed or superseded [illegible] cannot be recovered back in a reg[illegible] under which it was recovered [illegible] for restitution when the decree is [illegible] a zemindar under a Revenue Court's decree [illegible] to his *gomashta* will not lie.[6] [illegible] for cutting and carrying off crops fro[illegible] obtained possession under a decree w[illegible] successive decrees for rent have been [illegible] which is afterwards reversed on appeal, a [illegible] paid under the other decrees [7]

Other Judicial Orders—A suit will [illegible] up for public purposes [8] But a suit [illegible] Magistrate passed under s 518 Act X, 1872, [illegible] relief by declaring plaintiff's right [illegible] but [illegible] road public,[10] or declaring a certain river [illegible] distinct proof of plaintiff's title to exclusive po[illegible] removal of a *kotha* as an obstruction on a publ[illegible] But such orders would not prevent the person a[illegible] given showing in a suit that it is his own property [illegible] the order of a [illegible] treated as a k[illegible] rights of way [illegible] under colour [illegible] property [17]

Defamation—A suit will lie for damages for exhib[illegible] according to a Full Bench decision of the Calcutta High Court, [illegible]

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[1] Soorji Jivandas petitioner, (1881) 5 Bom 638 [illegible] Dhanbaiji, (1888) 12 Bom, 164 Nistariny v Brahmamayi [illegible]

[2] Birj Lal v Secretary of State, (1898) 20 All, 109

[3] [illegible] I A 203 [illegible] ash Chunder [illegible] Full Bench [illegible] Dhun, (1880) 5 Cal [illegible]

[4] [illegible]

[5] [illegible] R App 111

[6] [illegible]

[7] [illegible]

[8] [illegible]

[9] [illegible]

[10] Ujalamayi Dasi v Chandra Kumar, 4 B L R (A C) 21

[11] Ramkristo v Kaloo 18 W R, 284

[12] Meechoo v Ravenshaw, 19 W R 345

[13] Bikas Ram v Chumman Ram 7 W R 11

[14] Lalji Ukheda v Jowba, (1882) 8 Bom H C 94 Green v Hutchings, 6 Q B D, 300

[15] Anund Chunder v Rokho Tarun (1865) 2 W R 287

[16] Sham Doss v Bholi Doss (1864) 1 W R, 324 [illegible] Mahom [illegible] Safir, (1864) 1 W R, 277

[17] Dab Chunder v Joy Chunder, (1874) 22 W R, 401

[18] [illegible] Dwarka Pershad, 2 All H C, 435

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1 Kaliyugam v Chokalinga, (1884) 7 Mad, 105, Sama Rayar v Annamalai, (1884) 7 Mad, 164, otherwise in Bombay—Himmatlal v Shivajirav, (1884) 8 Bom, 593, cf Sakharam Dikshit v Ganesh, (1879) 3 Bom, 193 See s 14.

2 Imamun v Hurdyal, (1866) 5 W. R, 276

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4 Manchharam v Bakshee Saheb, 6 Bom H C, 231, Merwanji v Ashabai, (1884) 8 Bom, 1.

5 Ananda Moyi v Patit Pabani, (1863) B L R, (F B) 18

6 Merwanji v Ashabai, (1884) 8 Bom, 1, p 12, Act XV of 1882, s 94, otherwise in Calcutta—Golam Arab v Curreem Bux, (1880) 5 Calc, 294

7 Varadarajulu v Srinivasulu, (1897) 20 Mad, 333 See "FRAUD," infra

8 Sadhu Misra v Golap Singh, (1896 7) 1 Calc W N, cc referred to in ... N, 1024, Pran Nath v Mohesh Narain Tewari v Shew Bhanjan, ...chhoman Das, (1899) 21 All, 289, All, 347 See "FRAUD, infra

9 Jogeswar Atha v Ganga Bishun, (1903 4) 8 Calc W N., 473

10 Bommanapati v Chintakunta, (1903) 26 Mad, 264

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12 Roghoobur Dyal v Ram Narain, (1874) 22 W R, 312

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14 Mayho v Williams, 2 All H C, 268

15 Komollochun Dutt v. Nilruttun, (1879) 4 Calc, 360; 4 C. L R, 175

16 Umanath Mookhopadhya v Nilmoney Singh, (1881) 6 Calc, 429, (1884) 10 Calc, 19, L R 10 I A, 80.

17 Nobeen Chunder Sil v Dhobo Soondari, (1881) 6 Calc, 460, Surbomongala v Shashibhooshun, (1884) 10 Calc, 413

18 Brinda Chowdhrain v Radhica, (1885) 11 Calc, 492

remedy is, possibly by review of judgment [1] When a grant of letters of administration made by a District Judge had been revoked under s 50, Act V of 1881, it was held that the cause of revocation being removed, the Judge had jurisdiction to entertain a fresh application for the same object [2]

Existing Decree—A decree or judgment must be considered valid until reversed or superseded Hence, money recovered under a decree or judgment cannot be recovered back in a regular suit so long as the judgment or decree under which it was recovered remains in force ,[3] though there is no bar to a suit [illegible] when the decree is reversed [4] A s[illegible] to reco[illegible]

[illegible]

which is afterwards reversed on appeal, a suit will lie to recover the excess money paid under the other decrees [7]

Other Judicial Orders—A suit will not lie for a right of way over land taken up for public purposes [8] But a suit did lie to declare that the order of a Magistrate passed under s 518 Act X, 1872 was without jurisdiction and giving relief by declaring plaintiff's right ,[9] but not to set aside an order declaring a road public,[10] or declaring a certain river to be a public thoroughfare without distinct proof of plaintiff's title to exclusive possession [11] or for directing the removal of a *kotha*, as an obstruction on a public thoroughfare ,[12] or of a shed [13] But such orders would not prevent the person against whom the order has been given showing in a suit that it is his own property ,[14] and a suit will lie against the order of a Magistrate ordering the removal of an encroachment which is not treated as a local nuisance,[15] or for any interference on his part with private rights of way ,[16] and a suit will lie on the allegation that the defendants had, under colour of an order of the Magistrate, dispossessed the plaintiff of private property [17]

Defamation—A suit will lie for damages for exhibiting an effigy ,[18] but, according to a Full Bench decision of the Calcutta High Court, not for mere

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[1] Soorji Jivandas petitioner (1881) 5 Bom 638 see as to citation Hormusji v Dhanbaiji, (1888) 12 Bom , 164 , Nistarini v Brahomoyi, (1891) 18 Calc , 45

[2] Birj Lal v Secretary of State, (1898) 20 All , 109

[3] [illegible] I A 203 and see Nilmoney Sing[illegible] esh Chunder v Kalichurn (1878) [illegible] Iohun, (1880) 5 Calc 589

[4] [illegible]

[5] Saudamini Dasi v Thakomani Debi, 3 B L R App , 114

[6] Shurnomoyee v Pattari Sirkar, (1879) 4 Calc , 625 Jogesh Chunder v Kali Churn (1878) 3 Calc , 30 though in a somewhat similar case, relief was given by review—Waghela v Masludin (1889) 13 Bom , 330

[8] Fenwick, in the matter of, (1870) 6 B L R , App , 47 , 14 W R , Cr 72

[9] Kedarnath v Rughonath, 6 All H C 104 , Gopi Mohun v Taramoni, (1880) 5 Calc , 7 and see Bradley v Jameson, 11 C L R 414

[10] Ujalamayi Dasi v Chandra Kumar, 4 B L R (F B) 24

[11] Ramkristo v Kaloo 18 W R , 284

[12] Meechoo v Ravenshaw 19 W R , 345

[13] Bikas Ram v Chumman Ram 7 W R , 11

[14] Lalji Ukheda v Jowba (1852) 8 Bom H C 94 Queen v Hutchings, 6 Q B D , 300

[15] Anund Chunder v Rokho Tarun, (1865) 2 W R , 287

[16] Sham Doss v Bhola Doss (1864) 1 W R , 324 Kadir Mahom[illegible] v Mahomed Safir, (1864) 1 W R , 277

[17] Deb Chunder v Joy Chunder, (1874) 22 W R , 461

[18] Pitumber Doss v Dwarka Pershad, 2 All H C , 435

abusive language not amounting to defamation[1] No suit for slander or libel arises out of the omission of titles of courtesy in addressing the plaintiff[2] The surviving members of a joint family cannot sue for defamation of a deceased member[3] nor a father for defamation of his daughter[4] Male relatives have no right of action for slander of their female relatives[5] An action for slander cannot be brought jointly against several defendants Separate actions should be brought against each[6] except where there is special damage, the result of the conjoint action of all the defendants[7]

Malice —See Jenoure v Delmege App Cas 1891, p 73, Hicks v Faulkner, 8 Q B D, 167 p 174 Ordinarily the absence of a reasonable and probable cause in instituting a proceeding which terminates in favour of the plaintiff would give rise to the inference of malice[8]

Distraint —A wrongful distraint may be set aside by a landlord the crops of whose tenants have been wrongfully distrained by a stranger[9]

Doctor's fees —The fact of a doctor treating a patient before being paid, is no bar to his suit to recover his fees[10]

Embankments —As to the liability of zemindars to keep up embankments[11]

False Imprisonments. —To constitute false imprisonment, the restraint must be total and not partial in any particular direction,[12] but the restraint need not be the result of actual force and if an officer tells a person that he must go with him it is sufficient[13]

By Jailor See Migotti v Colvill 4 C P D 233

Under Warrant of Civil Courts —See Fishery Pearse 9 Bom, 1

False Charge As to the distinction between a false charge and illegal imprisonment[14] Before a suit can lie the result of the charge must show there has been no ground for bringing it[15] Thus where a person has been adjudicated a bankrupt [illegible] he cannot sue on the ground

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1 Girish Chunder v. Jata Bhari (1899) 26 Cal, 653, 3 Cal W N 341 Shoonti Moni v. Nil [illegible] Biswas (1881) 8 Cal, 452; Kashiram v. Bhadur, 7 Bom H C [illegible]

2 Sitarama v. Sitapat Rao 1 Mad H C Rep [illegible] As to the decision [illegible] see Villabha v. Madusudanan (1889) 12 Mad, 495

3 [illegible] (1881) 5 Bom 580

4 Bayan v. Puran Nath (1880) 11 All 301

5 Chhit v. Bhawani Prasad All H C Rep, 1866, p 204, Subbaiyar v Kristnaiyar (1878) 1 Mad 383

6 Nil Madhab v. Dukhiram, (1875) 15 B L R, 161

7 W[illegible] v. Mahomed Hossein, (1875) 15 B L R, 166, note.

8 Jang Bahadur v. Lal Gulzar, (1896 7) 1 Calc W N 537.

9 Hari Narain v. Shoodha Kristo (1879) 4 Calc, 890

10 Harish Chunder v. Brojo Nath, (1870) 13 W. R, 96

11 Nuffur Chunder Bhutto v. Jotendro Mohun, (1881) 7 Calc, 505

12 Bird v. Jones, 7 Q B, 742, s 340, Penal Code

13 Pocock v. Moore, Ry & Mo, 321, Grainger v Hill, 4 Bing, N C, 212. For cases of this nature, see Pudda Vencatapa v Aruvala 2 Moo I A 504, Madhab Chandra v Beni Madhab, (1871) 15 W R 85, Patton v Hariram, All H C Rep, 1869, p 409, Pirankustum v Stuart, 2 Mad. H C Rep, 396, Sinclair v Broughton (1883) 9 Calc, 341, 13 C L R, 185, L R, 9 I A, 152, and Acworth v Shavaksha (1895) 19 Bom, 493 in which the Municipal Commissioner of Bombay was held liable in damages for the wrongful arrest of a plaintiff in execution of a warrant, whose force was spent

14 Austin v Dowling L R, 5 C P 534, Imperatrix v Lakshman, (1878) 2 Bom, 487; Hicks v Faulkner, 8 Q B D, 167, p 170

15 Basebe v. Mathews, L R, 2 C P, 684

that the petitioner had falsely and maliciously made him a bankrupt,[1] and a conviction unreversed on appeal bars an action for malicious prosecution[2] The charge must have been made without any reasonable or probable cause,[3] and this must be proved by the plaintiff[4] And if the first Court supports the charge, this strongly negatives this proposition, even though its decision may have been set aside on appeal[5] The plaintiff must also prove injury to his person, reputation or property[6]

False Evidence —No civil action lies against a witness for giving false evidence The only remedy against a false witness is a prosecution for perjury[7]

Ferry —The owner of a ferry granted under a Government settlement will have an action against any person running a ferry over the same spot, when the latter does not use the ferry for his own conveyance, and that of the servants merely,[8] and a rival ferry cannot be set up so as to interfere with the proprietary right in an existing ferry[9] nor will a suit lie to re open a ferry which had been included in a settlement of an estate obtained from Government but which had been closed by an order of a Magistrate[10] A suit for compensation for converting a ferry under private management to a public ferry is not maintainable,[11] and though a man may set up a ferry on his own land and take tolls,[12] it is doubtful if he can claim a monopoly without a grant from the Crown[13]

Fishery —The right of fishing in a navigable river does not belong to the public nor is the Government prohibited by any law from granting to individuals the exclusive right of fishing in such a river[14] and a private right of fishery in a tidal navigable river must be derived from the Crown[15] The right of fishery in such a river, as also the bed of river itself may be granted by Government to private individuals,[16] and a Civil Court has jurisdiction to try a suit for damages for, and to restrain by injunction, an illegal disturbance of the plaintiffs right to fish in the sea below low water mark[17] But a suit for the possession of a right to fish in a *khal* the soil of which does not belong to the plaintiff, does not come within the provisions of s 9 of the Specific Relief Act (I of 1877)[18] Where a lease transferred to the lessee an incorporeal right, it

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[1] Metropolitan Bank v Pooley 10 App Cas, 210

[2] Bhairab Chandra v Mohendro, (1870) 13 W R 118, Swami Nayudu v Subramania 2 Mad H C Rep, 158

[3] See as to the words Burns v Nowell 5 Q B D 444, Thompson v Farrer, 9 Q B D, 372 Hicks v Faulkner 8 Q B D 167

[4] [illegible] 321, 17 W R, 283, Hall ven Ira v Kashinath (1895) 1 Calc W N, 537, Abrath

[5] Paimi v Bellamkonda 3 Mad H C Rep, 239, Viranna v Nagayyah, 3 Mad 6 Koibatulla v Moti (1870) 13 W R 270

[6] Abrath v North Eastern Ry 11 Q B D 448 Hicks v Faulkner, 8 Q B D 167

[7] Templeton v Laurie (1901) 25 Bom, 230

[8] Luchmessur Sing v Leelanund Sing (1879) 4 Calc 599, 3 C L R, 427

[9] Narain Singh v Narendra Narain (1874) 22 W R, 296

[10] Ramgiwan v Collector of Shahabad (1871) 15 W R, 132

[11] Collector of Pubna v Roma Nath Tagore (1867) 7 W R, 191, but see Govind Sing v Magistrate of Ghazipur 4 N W 146

[12] Luchmeswar Singh v Manowar, L R, (1892) 19 I A, 48, 19 Calc, 253

[13] See Nityagari v Dunne (1881) 18 Calc 652

[14] Chunder Jaliah v Ram Churn, (1888) 15 W R, 212

[15] Prosunno Coomar v Ram Coomar, (1879) 4 Calc, 53 See also Horidas Mal v. Mahomed Jaki, (1885) 11 Calc, 434

[16] Satcowri Ghosh v Secretary of State (1895) 22 Calc, 252

[17] Baban Mayacha v Nagu, (1878) 2 Bom, 19

[18] Jadu Jhola v Gour Mohan, (1892) 19 Calc, 544, Natabar v Kubir, (1891) 18 Calc 8

was held that the suit for the rent of such a tank was triable by the Civil Court and not by a Revenue Court under Act X of 1859 [1]

Foreign State —Courts have no jurisdiction to interfere with the public property of a foreign sovereign, though he may have submitted to the jurisdiction of the Court for the purpose of enabling the Court to order the property to be delivered over to him [2] An act of state by a foreign power cannot affect rights to property in British India [3] Defendant No 1 domiciled in the Native State of Cochin obtained from the Resident a certificate to collect the debts of a deceased karnavan of the plaintiff's tarwad The plaintiff whose domicile was the same as that of the defendant No 1 sued for a declaration of the right to receive the interest accrued due on certain Government promissory notes, being the property of the deceased karnavan *held* that the suit did not lie [4] A suit will lie on a judgment of a Court in a Native State [5] There is no appeal to the King in Council from the political jurisdiction of Agency Courts in Kattiwar [6]

Forest Officer —A munsiff has no jurisdiction to entertain a suit to cancel the decision of a Forest officer confirmed by a District Judge under s 10 of the Madras Forest Act (V of 1882) and recover a certain tank a claim to which had been rejected under that section [7] The plaintiff sued in Court at Nasik in British India to establish his right to a share in the income derived from certain grants of land situate outside of British India but received by the defendant within the jurisdiction of the Nasik court *Held* that the suit was within the jurisdiction of the Court [8]

Fraud —A suit will lie to set aside a decree on the ground of fraud [9] On the ground that the plaintiff's father's agent had colluded with the person who had obtained the decree and had given false evidence and that the decree had been obtained thereby [10] The plaintiff must prove the fraud It is not enough for him to show that the defendant has told an untrue story [11] There must be an allegation of actual not constructive, fraud,[12] but not if the plaintiff urged fraud in the first Court after the decree had been passed and failing did not appeal though an appeal was allowed [13] In England the judgment of a foreign Court on fraud is not conclusive [14] and generally a suit will lie unless the question of fraud has been decided,[15] or it has been committed by one party in execution proceeding,[16] but unless the parties sue to set aside the decree directly it

[1] Mahanand Chakravartti v Mongola Keotani, (1903 4) 8 Calc W N 804

[2] Vavasseur v Krupp, 9 C D, 351

[3] Giridharji v Madhowdas (1893) 17 Bom, 600, Govardhanlalji v Girdharlalji (1893) 17 Bom, 620

[4] Ammum v Krishna (1893) 16 Mad, 405

[5] Mayaram v Ravji, (1900) 24 Bom, 86

[6] Hemchand v Azam, (1906) 3 Calc L J, 395, 8 Bom L R 129 (1906) 33 Calc, 219

[7] Ram Chandra v Secretary of State, (1889) 12 Mad, 105

[8] Kashenath v Anant Sitaramboa, (1900) 24 Bom, 407

[9] Golab Chand v Prosunno Coomaree, (1893) 20 W R, 86, Lim Act, sch II, art 95 Flower v Lloyd, 6 C D 297, Nilmoni v Amunissa, (1886) 12 Calc, 156, Abdul Mozumdar v Mohamed Gazi, (1894) 21 Calc, 605, Manchharam v Kalidas, (1895) 19 Bom, 821

[10] Krishna Bhupati v Ramamurti, (1893) 16 Mad, 198

[11] Mahomed Golab v Mahomed Sulliman, (1894) 21 Calc, 612

[12] Patch v Ward, L R, 1 Eq C, 436,

[13] Raj Kishen v Madhoo Soodun, (1872) 17 W R, 413

[14] Abouloff v Oppenheimer, 10 Q B D, 295, see also Nouvion v Freeman, 35 C D, 704, p 720

[15] Widgery v Tepper, 7 C D, 423,

[16] Paranjpe v Kanade (1882) 6 Bom, 148, Mohendra Narain v Gopal Mandal (1890) 17 Calc, 769,

cannot be impugned indirectly, and must be given effect to [1] Fraud may be also raised as a defence [2] But in the execution of a decree ordering the sale of immoveable property, it is not competent for the Court to refuse to sell it, because a stranger to the suit who is in possession of the property impeaches the decree on the ground of fraud he must file a suit and get an injunction [3] Definite and clear knowledge of facts constituting fraud must be proved [4] The Original side of the High Court of Calcutta can on the ground of fraud entertain a suit to set aside a decree passed by another Court of concurrent jurisdiction [5] A Court can treat as a nullity a decree of another Court of concurrent jurisdiction, if such decree has been obtained by fraud [6] If a decree is not tained with fraud, no suit lies to set it aside The suit must be brought in the District in which the fraudulent decree is obtained [7]

Pleading—In all cases of fraud the plaint must set forth the particular acts alleged to constitute the fraud,[8] and the plaintiff cannot succeed on any other [9] Fraud not mentioned in the plaint or raised in the issues cannot be taken into consideration [10] See also 'FRAUD'

fraud and an inno t sue to have it set the fact that the itle [13] When property has been conveyed by the owner to another person with the object of defeating his (the owner's) creditors and the fraud has been carried out the owner cannot succeed in a suit to recover possession [14] But when a plaintiff sued for a declaration of his title to certain land which had been purchased by him in the name of the defendant the object of the transaction having been to conceal from the Collector the fact that the plaintiff, who was a tahsildar, had acquired property in his taluk contrary to the rules of his department *held*, that he was entitled to the declaration sought for [15] In a partnership suit, it appeared that two sets of accounts were kept one true and the other false to deceive Government *Held* that this did not disentitle the plaintiff from showing as between himself and his partner what was the actual profit of the concern [16]

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1 Haro Chunder Biswas v Nobo Kissen Mookerji W R 1864 p 159 See Mewalal v Bhujhun (1874) 22 W R 213 and Sadhu Misser v Golap Singh, (1896 7) 1 Calc W N, cc Ram Sarup v Rukmin Kuar, (1885) 7 All, 884

Ahmedboy v Vulleebhoy (1882) 6 Bom, 703, Bandon v Becher, 3 Clk and Fin 479

3 Purshottum v Purshottum (1884) 8 Bom, 532

4 Rahimboy v Turner, L R 20 I A, 1

5 Nistarini Dasi v Nundo Lal Bose 30 Calc, 369, 7 C W N, 353

6 Nistarini Dasi v Nundo Lal Bose (1898 9) 3 Calc, W N, 670 On appeal, (1903) 7 Calc W N 353 30 Calc, 369 See also Rajib Panda v Lakhan, (1900) 27 Calc, 11 Barkatunnissa v Fazl Haq, (1904) 26 All, 272

7 Anwar v Hardes, (1907) 29 All 418

8 Mir Azimuddin v Ziaulnissa (1882) 6 Bom, 309 Ganga Narain v Tilluckram L R 15 I A, 119 (1888) 15 Calc, 533

9 Abdul Hossein v Turner (1887) 11 Bom, 620, L. R 14 I A 111 Krishnaji v Wamnaji (1894) 18 Bom 144, Chanvirappa v Danava, (1895) 19 Bom, 593

10 Imdad v Azizunnissa, L R 23 I A 17 (1896) 23 Calc, 492

11 Chenvirappa v Pattappa, (1887) 11 Bom, 708, Venkatramanna v Viramma, (1887) 10 Mad, 17 Rangammal v Venkatachari, (1895) 18 Mad, 378, (1897) 20 Mad, 323, Yaramati v Chundru (1897) 20 Mad, 326

12 Varadarajulu v Srinivasulu, (1897) 20 Mad, 333

13 Barkatunnissa v Fazl Haq (1904) 26 All, 272

14 Honapa v Narsapa, (1899) 23 Bom 406 Banka Behari v Raj Kumar (1900) 27 Calc, 231, 4 Calc W N, 289 Gobinda Kuar v Kishun Prasad, (1901) 28 Calc, 370

15 Lobo v Brito, (1898) 21 Mad, 231

16 Ganesh Vithal v Shripad Dathoba, (1896) 20 Bom, 669.

Interest—As to advances and interest on advances when a deed is set aside for fraud, see the undernoted case [1]

Effect of suit—Where a decree is set aside for fraud the parties are not remitted to the position they held before the decree [2] Though a decree may be declared fraudulent and void against the one defendant, it remains a subsisting decree against the others [3]

Limitation—When the appellant claimed in 1886 that a sanad, which, in 1803 appointed the zemindar of Shivaganga, had been obtained from the Government by the fraud of the grantee, who, with his descendants, had thenceforth enjoyed the estate to the knowledge of the appellant's predecessors, it was held that no suit would lie after such a lapse of time [4]

Haut—When a plaint alleged that plaintiff held a haut on his land for many years, that the defendant had set up a rival haut on the same days, and tried to prevent persons from attending plaintiff's haut that this led to the Magistrate's passing an order prohibiting the plaintiff from holding his haut, in consequence of which he suffered loss and damage *Held*, a good cause of action [5]

Hereditary Office and Pension—As to how far a suit will lie for a pension, see the undernoted cases [6] A suit for a share of a vatan will lie,[7] or to be declared a vatandar,[8] but inam grants of a personal or political character are within the prohibition A suit for maniam lands attached to the hereditary office of village carpenter is barred by the operation of s 3, Reg VI of 1831 [10] A Civil Court has no jurisdiction to entertain a suit for a declaration of a plaintiff's status as representative *watandar* This equally with the duty of ascertaining the custom of the *watan* as to service, is a duty by s 25 of the Bombay Hereditary Offices Act (Bombay Act III of 1874) imposed on the Collector and not on the Civil Court—Krojı v Genu, 22 Bom, 344 When a Collector's certificate under s 10 of the Vatan Act (Bombay Act III of 1874 is based on a misunderstanding of the term *vatan*, it is illegal and is not binding on the Civil Court [11] A suit by one member of a family against another for the declaration and enforcement of a hereditary right to officiate as priest

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[1] Ajit Singh v Bijai L R 11 I A, 211, Pertab Bahadur v Chitpal, L R 19 I A, 33, (1892) 19 Calc, 174

[2] Bhimaji v Rakmabai (1886) 10 Bom, 338

[3] Pasupati Nath Bose v Nundo Lal Bose, (1903) 30 Calc, 718

[4] Gauri Vallabh v Zemindar of Shivaganga, L R 21 I A, 93

[5] Gopi Mohun v Taramoni, (1869) 4 C L R, 309, 5 Calc, 7 compare Kedarnath v Rughonath, 6 All H C, 114 As to the evidence necessary to prove a monopoly, see Rakhal Das v Durga Sundari, (1890) 17 Calc, 458

[6] Khando Narayan v Apaji, (1878) 2 Bom, 370 Chinto Abaji v Lakhshmibai, (1878) 2 Bom, 375, Gopal Hanmant v Sakharam, (1880) 4 Bom, 234; Vasudeb Vithal v Ram Chandra, (1882) 6 Bom, 120, *and as to what are pensions*—Vasudev Shadashiv v Collector of Ratnagiri, L R 4 I A, 119, Pirbhudas Rayaji v Motiram Kaljandas, (1876) 1 Bom, 203, p 206, Secretary of State v Jamnadas, (1882) 6 Bom, 737, and Hazara v Collector of Burdwan, (1875) 23 W R, 378, overruled by Maharaval v Government of Bombay, L R 8 I A, 77.

[7] Moheyodin v Chhotibibi, (1881) 5 Bom, 578 ; Mahomed Israck v Azeezoonnissa, (1882) 4 Mad, 245

[8] Ramchandra v Anant Sat, (1884) 8 Bom, 25, see also Balkrishna v Balaji, (1885) 9 Bom, 25 ; Parsha v Lagmyashan, (1889) 13 Bom, 83, Janardanrav v Secretary of State, (1889) 13 Bom, 442, Govind Sitaram v Bapuji, (1891) 18 Bom, 516

[9] Panchanadayyan v Nilakandayyan, (1884) 7 Mad, 191 See also in regard to inam land—Venkata v Rama, (1885) 8 Mad, 249, Srinivasayyar v Lakshmamma, (1884) 7 Mad, 206 Venkatanarasimha v Suryanarayana, (1889) 12 Mad., 188 ; Venkatanarayana v Subbarayudu, (1886) 9 Mad, 214

[10] Palamalai v. Shanmuga, (1894) 17 Mad., 302.

[11] Ramangavda v Shivapagavda, (1898) 22 Bom, 601.

at the worship performed by votaries at the foot of a certain tree and also to have a share in the offerings made to the deity is maintainable [1]

Sanction—Suits under the Pensions Act require sanction A suit for a grant of money which comes under the definition of pension under s 4 Act XXIII of 1871 will not lie in the absence of the Collector's certificate though Government is not a party [2] A suit brought against a Sardar in the Court of the Agent for Sirdars in the Deccan requires a Collector's certificate [3] A suit for malikana will not lie without a certificate under the Pensions Act, s 6 [4] A village, part of an estate had been made over to the Government by the parties who in consideration received a malikana in perpetuity *Held* that the right to the malikana was on a construction of ss 3 and 4 of the Pensions Act in the absence of a certificate obtained under that Act excluded from judicial cognizance in the suit [5] A plaintiff claimed to be a co trustee of certain dargas and entitled to a share in the management and in the profits thereof which consisted of a certain cash allowance from Government *Held*, that the suit so far as it related to the cash allowance from Government required a certificate under s 4 of the Pensions Act [6] S 4 of the Pensions Act, 1871 applies to a heritable right to receive Land Revenue granted by Government as a reward for services rendered [7] If the requisite sanction is obtained before decree the original defect is cured [8] A suit brought in relation to the management of *saranjam* land is *prima facie* one not included in the Pensions Act [9] In a suit by an *inamdar* of a village against a *khot* for rent, it was held that the Court was not precluded from entertaining the suit for want of a Collector's certificate under the Pensions Act (XXIII of 1871) s 4 [10] 'Suit' in s 4 of the Pensions Act, does not include execution proceedings so the Collector's certificate is not necessary to validate a sale in execution of a decree [11] A suit relating to inam land granted before the time of the British Government does not fall within the provisions of the Pensions Act, s 4, and the Collector's certificate is unnecessary [12]

Assignee—The assignee of a pension under the Pension Act cannot sue [13] unless the assignment took place before the Pensions Act [14]

Hindu Widow—A suit for recovery of property is not maintainable by a Hindu widow who on remarriage forfeits the estate inherited from her husband [15]

Instalment—When a creditor evades the attempts of a debtor to pay the instalments of a bond as they became due, no suit is maintainable by the debtor to compel the creditor to accept an instalment due [16]

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1 Dinonath v Prathpchandra (1900) 27 Calc 30 4 Calc W N 79
2 Vyankaji v Sarjarao (1892) 16 Bom 537
3 Daji Nilkanth v Ganpatrao Nilkanth (1893) 17 Bom 624
4 Andi Achen v Kombi Achen (1895) 18 Mad 187
5 Deo Kuar v Man Kuar (1895) 17 All 1 L R 21 I A 148
6 Miya Vali Ulla v Bava Saiti (1895) 22 Bom 496
7 Ihtisham Ali v Sham Sundar (1903) 25 All 73
8 Mahammad Azmat v Lalli (1882) 8 Calc 422 Jijaji v Balkrishna (1893) 17 Bom, 169
9 Keshavrav v Ganpatrao (1892) 16 Bom 596
10 Gangadhar Hari v Morbuat (1894) 18 Bom 585
11 Vapram v Ranchordji (1892) 16 Bom 731
12 Tirumalu Naik v Bangaru Tirumalai (1898) 21 Mad 510
13 Imtiaz Begum v Liakatunnissa (1884) 6 All 630
14 Imtiaz Begum v Liakatunnissa (188) 7 All 880
15 Matungini Gupta v Ram Rutton Roy (1892) 19 Cal 289 See also Fasul Jehan v Ram Surun Singh 22 Calc 589 Vithu v Govinda (1898) 22 Bom, 321, Murugayi v Viramakali (1876) 1 Mad 226
16 Kristaya v Kasi Lati, (1886) 9 Mad, 65

Interest—A suit will not lie for interest in respect of money deposited under a decree subsequently reversed on appeal [1]

In execution of a decree plaintiff attached certain money but was opposed by the defendant Plaintiff finally succeeded in obtaining the money He then sued the defendant for interest during the time he was prevented by him from obtaining it Such a suit was held to be maintainable [2]

Inam—A suit by the grantees to contest the right of Government to resume an inam granted for feeding Brahmins will lie [3]

Karnams—The lessees of a zamindari are not entitled to sue for the removal of a *Karnam* from office though their lease contains a provision purporting to authorise them to appoint and remove *karnams* but if they suffer any loss from the *karnam's* neglect of his statutory duty they are entitled to bring an action for damages against him [4]

Land Registration The Collector with the subsequent sanction of the Board of Revenue ordered on notice to the proprietor and lessees of a zamindari that separate registration and [illegible] of the appellant's village situate therein be made under Reg XXX of 180[illegible] s 6 and Act I of 187[illegible] Thereafter the Government on the application of one of the lessees without notice either to the appellant or the Collector ordered the latter to cancel the registration In a suit by the appellant praying for a declaration that this order was *ultra vires* and illegal *held* that the Collector's order could only be questioned in a Civil Court and that separate registration as distinct from the amount of sub-assessment, was a matter of private right with which the Government had no power to interfere [5]

Land Revenue—A suit will lie against the Secretary of State to have it declared that certain lands lie within the ambit of a permanently settled estate and are not liable to be again assessed [6]

Legal Representative—A plaintiff is entitled to sue the legal representative of his deceased debtor without proving that assets have come into his hands It is sufficient if there are assets of which he may become possessed [7] See notes under ss 47, 5[illegible], 152 and O XII rr 2, 4 5 and 6 and O XX r 6 In a suit by a creditor against the estate of a deceased debtor, his heirs on intestacy do not represent the estate, and the suit is bad, unless the estate is represented [8]

Mahomedan Law—A creditor is only entitled to sue one heir, when the whole estate is in his possession [9] and if the heirs have divided the property he can only recover against each according to his share [10] A suit for money due by a deceased Mahomedan lies against one of the heirs in respect of his share in the property left by the deceased though it cannot proceed so as to bind the widow's share [11]

Maintenance—*Widow*—A widow who is unchaste has no right of maintenance[1] and even if she is chaste, she has no right of maintenance against her

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[1] Ashruffunnissa v Khanum Jaun, (1866) 6 W R, 285

[2] Parbutty v Promotho Nath, W R, 1864, 174

[3] Subramanya v Secretary of State, (1883) 6 Mad, 361

[4] Kumarasami v Orr (1897) 20 Mad, 145

[5] Fischer v Secretary of State L R, 26 I A, 16

[6] Secretary of State v Tahaminannissa, L R 17 I A, 40, Secretary of State v Ramugrah, (1885) 7 All, 140

[7] Girdharlal v Bhai Shiv, (1884) 8 Bom, 300

[8] Matangini v Chunimani, (1895) 22 Calc, 903

[9] Hamir Singh v Zakia, (1876) 1 All, 57,

[10] Pirthi Pal v Husaini Jan (1882) 4 All 361 Jafri v Amir, (1885) 7 All 822, Bussunteram v Kamaluddin 11 Calc, 421 But see, Muttyjan v Ahmed Ally (1882) 8 Calc, 370, Mulleeka v Jumeela, L R I A, Sup Vol, p 135

[11] Ambashankar v Ali Fasul (1890) 19 Bom, 273

[1] Valu v Ganga, 7 Bom, 84, Roma Nath v Rajonmoni, (1890) 17 Calc, 674

father in law who has not ancestral property,[1] but generally an heir taking property is bound to support those whom the previous owner was morally bound to support [2] And the right to maintenance may be made a charge on the family property [3] A decree in favour of a widow can be set aside on proof of subsequent unchastity [4] A Hindu widow cannot sue for arrears of maintenance when she has made no demand before suit [5] But if the right to the income of certain assigned property is based on a compromise in a suit made between the widow and the brothers of her deceased husband and there is no express stipulation for forfeiture on the ground of unchastity, the widow does not forfeit her right in the event of her being proved to be unchaste [6]

Wife—A wife and daughter must be maintained out of the husband and father's property, and the maintenance may be made a charge on it [7] But an unchaste wife is not entitled to maintenance [8]

A Hindu woman obtained a decree for maintenance against her husband and subsequently sued him for a declaration that certain land should be charged, saying that he had alienated other property to get rid of her maintenance It was held she had no cause of action [9] An order for the [illegible]
made under s [illegible]
tory decree of [illegible]
will a suit lie [illegible]

Daughter in Law—The obligation of a Hindu to maintain his daughter in [illegible]

[illegible]

Illegitimate Son—A suit brought against a Hindu by a woman who was a Mahomedan and the wife of a Mahomedan, for maintenance of her illegitimate child, of which she alleged the defendant to be the father was held not to be maintainable [14] But a suit for maintenance of an illegitimate child lies in a Civil Court, though an application under s 488 Crim P C, Act V of 1898, has been refused [15] Under Mitakshara law, an illegitimate son is entitled to maintenance [16] This is a personal right, which does not descend to his son [17]

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[1] Kalu v Lakshmibai (1883) 7 Bom 127

[2] Kamini v Chandra (1890) 17 Calc 373 Janki v Nand Ram 11 All 194, and see Adhibai v Cursandas (1887) 11 Bom 199

[3] Bhagirathi v Anantha, (1894) 17 Mad 268

[4] Daulta Kuari v Meghu Tewari (1893) 15 All 382 Vishnu Shambhog v Manjamma, (1885) 9 Bom, 108

[5] Seshamma v Subbarayadu (1895) 18 Mad 403

[6] Bhup Singh v Lachman Kunwar (1904) 26 All 321

[7] Mansha v Jiwan, (1884) 6 All 617

[8] Kandasami v Murugammal (1896) 19 Mad 6

[9] Sammatha v Rangathammal, (1889) 12 Mad, 285

[10] Subhudra v Basdeo Dube (1896) 18 All, 29

[11] Deraje v Marati (1907) 30 Mad 400 See note 15 infra

[12] Ratan Chand v Harimani, (1866) 5 W R, 225

[13] Yamuna v Manabai (1899) 23 Bom 608

[14] Adloyto Chunder Dass v Woojan (1879) 4 C L R 154 Compare Kuppa v Singaravelu, 8 Mad 325 and Nilmony Singh v Baneshar (1879) 4 Calc, 91

[15] Ghana v Gerali, (1905) 32 Calc 479 see note 11 supra

[16] Ananthaya v Vishnu (1894) 17 Mad 160

[17] Bilwant v Roshan, (1896) 18 All, 253

ing a trench[illegible] and a suit for damages for the death of a child killed on a[illegible] of the negligence of the Municipality in not properly fencing holes and dit[illegible] A suit will lie to recover house tax and water tax assessed on school build[illegible] [illegible] from a Municipality from recovering house tax, although the plaintiff [illegible] omitted to appeal to the Magistrate under s. 85 of Bom. District Municipal [illegible] III of 1873. A suit will not lie against a Municipality for mere non-feasa[illegible] neglect to repair a road.

[illegible] When a plaintiff sued the President of the Municipal Co[illegible] mission, Madras, to recover damages for the demolition of a house, it was he[illegible] that a letter which did not state [illegible] was not the date of its demo[illegible] [illegible] not that a suit [illegible] notice of action [illegible] s. 45 of the [illegible] [illegible] notice of a suit against [illegible] [illegible] three [illegible] [illegible] requires one month [illegible] against [illegible] [illegible] brought within [illegible] municipality [illegible] [illegible] of ejectment [illegible] living [illegible] [illegible] against a [illegible] of a [illegible]

Municipal Office. [illegible] [illegible] restrain [illegible] from [illegible] of a [illegible] [illegible] performance [illegible]

Office Dignity. [illegible] [illegible] as [illegible] to an office [illegible] [illegible] a suit [illegible] ments [illegible] [illegible] bols of recognition [illegible] recognition and honour [illegible] [illegible] not ing the same is not maintainable. A suit [illegible] [illegible] sheba [illegible] to enforce payment of a sum of money [illegible] [illegible] colony or an alleged custom [illegible] [illegible] marriage ceremonies [illegible] [illegible] [illegible] to members of the community [illegible] houses [illegible] [illegible] become vested in a [illegible] [illegible] action will lie to declare a person [illegible] to perform the duties of [illegible] receive the profits of [illegible] [illegible] to the offerings of certain temples [illegible] ground of [illegible] consisting of hereditary property [illegible] for a share in [illegible] fees received by plaintiff and defendant for the [illegible]

[illegible] Municipality v. Bombay (1893) 17 Bom. 3[illegible]
Narayan [illegible] v. Municipal Corporation of Bombay (1892) 16 Bom. 2[illegible]
Pisobo [illegible] 21 Mad. 2[illegible]
Chunila [illegible] Surat City Municipality (1903) 27 Bom. 4[illegible]
Acheatla v. Ahmedabad Municipality (1904) 28 Bom. 3[illegible]
[illegible] Dosaly v. President, Municipal Commission, Madras (1893) 1[illegible] Mad. [illegible]
Kashinath v. Gangabai (1898) 22 Bom. 2[illegible]
Manohar Ganesh v. Dakor Municipality (1898) 22 Bom. 2[illegible] Sadashivlamp[illegible] Gokak Municipality (1898) 22 Bom. [illegible]
Harilal v. Bimat (1898) 22 Bom. 6[illegible]
Municipality of [illegible] v. Manek Dobal (1898) 22 Bom. [illegible]
[illegible]ldhagat v. Abdul [illegible] (1877) 2 Calc. 1[illegible]
[illegible]anant v. Gangaram (1878) 2 Bom. 4[illegible] Ramji v. Sitaram (1882) 6 Bom. 1[illegible]
[illegible] v. Keshaorao (1887) 10 Bom. 2[illegible] [illegible] Maria [illegible] v. Ram [illegible]
[illegible] 1885) 17 Cal. 1[illegible] Sri [illegible] v. [illegible] (1888) 11 Mad. 4[illegible]
[illegible] Das v. Gooroo Dass (1871) 16 W. R. 1[illegible]
[illegible] Chunder v. Modhu Chandra (187[illegible]) W. R. 22[illegible]
[illegible]shankar v. Pestonji, 1 Bom. H. C. 12
[illegible] v. B[illegible] (186[illegible]) W. R. 7[illegible]

performance of certain religious ceremonies in certain villages in Behar[1] There is no doubt that the Civil Courts will recognize and enforce the rights of persons holding office connected with the management and regulation of Pagodas and if the holder of such office be entitled to remuneration for his services in the way of salary or otherwise, he would have a civil right entitling him to maintain a suit, if that remuneration has been improperly withheld So, too, suits are commonly entertained for the purpose of trying and deciding who are fit and proper persons of right to be entitled *dharmakartas* of a pagoda In such cases it will be found that offices have a secular character and are so dealt with though religious duties are attached to them the occupants being employed to exercise business functions either as trustees and managers of the property and funds of the pagoda or a
necessarily civil
of a civil suit ,
religious office c
religious observances in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral, and not a civil nature Of such obligations, the present Civil Courts cannot take cognizance Where a *swami*, or chief priest, of the *smartava* sect claimed an exclusive right of being carried crosswise in a palki on ceremonial occasions in virtue of a grant from the ruling power to a predecessor in office, their Lordships of the Privy Council had some doubt whether he could maintain an action against a party who had assumed the like privileges[3] Nor can a servant of a temple who takes food offered to the idol sue for damages the inamdar for not making the usual offering[4] The plaintiff is Anagundi Raja guru claimed to be entitled and now sued for a declaration of his title to the hereditary office of priest of Samaycharam The defendants claimed the office and had collected voluntary contributions in the character of the holders of such office The office was not connected with any particular temple No specific pecuniary benefit was attached to it, and the alleged duties of the office were to exercise spiritual and moral supervision over persons wearing a certain caste mark in a certain tract of country , *Held*, that the suit was not cognizable by a Civil Court[5]

Alienation —As a rule religious offices cannot be the subject of sale, but a decree may be given in favour of a purchaser of a *mirasi* office in a temple, when the question of its alienability is not raised[6]

Partition —Rights as joint trustees to the management and superintendence of worship at certain temple , none of the trustees having any pecuniary interest in the temples or their income cannot be made the subject of partition by a Civil Court that is to say, a Civil Court is not competent to grant a decree declaring that each of such trustees in rotation shall for a certain definite period enjoy exclusively the rights of management and superintendence[7]

Partition —A joint estate of any kind is partible, and possession not obtained by force or fraud is sufficient to support a partition[8] but a partial partition cannot be enforced, if objected to,[9] unless perhaps a portion of the property is

[1] Nundram v Kashe Pande 4 S D A Sel , 70

[2] Striman Sadagopa v Kristna, 1 Mad H C 301

[3] Sri Sunkur Bharti v Sidha Lingayah (1850) 6 W R (P C) 39 3 Moo 198

[4] Dhadphale v. Gurav, (1882) 6 Bom 122

[5] Tholappala v Venkata Charlu, (1896) 19 Mad 62

[6] Pangasami v Ranga (1893) 16 Mad , 146

[7] Raman Lalji v Gopal Lalji, (1896) 19 All , 4 8

[8] Sundar v Parbati L R , 16 I A 186

[9] Haridas v Pran Nath (1885) 12 Calc , 566 Parbati Churn v Ain (1881) 7 Calc , 577 , 9 C L R 170 Ranjit Ghose v Ram Ranjan, C L R , 367 Venkatarama v Meera (1890) 13 Mad 275 , Venlashmayya (1893) 16 Mad 98 but see Chinnu v Kuntamed, Mad , 324

and strangers[1] A Hindu wife cannot sue her husband for partition in the absence of any allegation that he refuses or has ceased to maintain her[2]

Party-wall —A suit will lie at the instance of one of two tenants in common of a party wall for the removal of a newly erected portion of it[3]

Partnerships —As to the practice pleading and procedure which should be followed in these suits, see[4] A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family property and an award of his share in such profits, when ascertained This rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm[5]

A surviving partner can sue alone for a partnership debt Such a suit may also be brought by a surviving partner jointly with the heir of the deceased partner[6]

Penalty —Where a penalty given by statute is enforceable in a particular way, it cannot be enforced by action[7] But where by statute a new mode of procedure is given where an action had been previously allowed the right of action is not taken away though it may affect the question as to costs[8]

A suit did not lie to set aside a sale of property legally carried out under s 185 Act XXI of 1861[9]

Possession —*Specific Relief Act* —A person dispossessed otherwise than in due course of law may sue within six months under s 9 Act I of 1877 and recover possession notwithstanding any other title that may be set up But a trespasser who has been dispossessed cannot bring such a suit[10] It has been held that a Court should in all cases in which it applies give effect to the provisions of s 9 of the Specific Relief Act whether that section is expressly pleaded or not[11] Where the plaintiff alleged that he was in possession of a certain room as representing his father and uncle who were alive but who were not parties to the suit and that he had been dispossessed from such room within six months it was held that his possession was not a juridical one and that he was not entitled to maintain a suit under s 9 of the Specific Relief Act[12]

Bengal Tenancy Act —There is no legal bar to the maintenance of a suit in the Civil Court for possession and *mesne* profits by ejectment of the defendant for certain plots of land in respect of which survey and preparation of a record of rights have been ordered under chapter X of the Bengal Tenancy Act, in which record the defendants have already been recorded as tenants, when the plaintiff's objections to such record are still pending before the Revenue officer and the record has not been finally published[13] A Revenue Court alone has jurisdiction

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[1] Purushottam v Atmaram, (1899) 23 Bom, 597 See Partition

[2] Punna Bibi v Radha Kissen (1904) 31 Calc, 476

[3] Kanakayya v Narasimhulu (1896) 19 Mad 38

[4] Ram Chandra Shaha v Manick Chunder, (1881) 7 Calc, 428, 9 C L R 157

[5] Ganpat v Annaji (1899) 23 Bom 144 As to a suit by one partner against another, see Koss Mol v Gopi, (1887) 9 All 120, Premji v Dosso, (1886) 10 Bom, 309

[6] Vaidyanatha v Chinnasami (1894) 17 Mad, 108 See also Chockalinga v Natesa, (1894) 17 Mad, 147

[7] London and Brighton Ry. Co v Watson 4 C P D, 118

[8] Anglo Italian Bank v Davies 9 C D, 275, Clutton v Lee 7 C D 541 See also Branson v Municipal Commrs of Madras, (1878 81) 2 Mad, p 369

[9] Bukhoree Singh v Government, (1867) 8 W R, 207

[10] Amirudin v Mahamad Jamal (1891) 15 Bom, 685

[11] Ram Harakh v Sheodihal, (1893) 15 All, 384

[12] Nritoo Lal v Rajendra Narain, (1895) 22 Calc, 562

[13] Troylokhya Nath v MacLeod (1901) 28 Calc, 28

to try a suit for abatement of rent, but the Civil Court has jurisdiction in so far as the claim is for refund of excess rents [1]

Mamlatdar's Court—A suit will lie in a Mamlatdar's Court when a person has been dispossessed or deprived of the use, or when he has been disturbed or obstructed, or when attempt has been made to disturb or obstruct him in the use, of water of which he is in possession or was in possession within six months before suit [2] There must be [illegible] to invoke the Mamlatdar's ass[illegible] Bombay Act III of 1876 A [illegible] sue for an injunction or dist[illegible] mortgagee is not possession [illegible] s 15 of Mamlatdar's Act (Bom[illegible] jurisdiction under that section [4] When in execution of a decree, a person not a party to the suit is dispossessed, his dispossession does not give him a cause of action within the jurisdiction of the Mamlatdar [5] In a possessory suit before a Mamlatdar, though a tenant cannot deny his landlord's title at the date of his lease, he can show it has since been determined [6]

Title.—According to the Calcutta High Court, a suit for recovery of possession on title will not lie on *mere* previous possession [7] In *Nisa Chand* v *Kanchiram*,[8] it was pointed out that in the case of *Ismail Ariff* v *Mahomed Ghous*,[9] in which their lordships of the Privy Council held that a plaintiff was entitled on proof of mere possession to obtain a declaration of title as against a wrong doer, the plaintiff had not been dispossessed, but was in possession and that the decision in this case is therefore no authority for holding that a plaintiff, who has been dispossessed can recover without proof of title In Bombay, however, it was held in *Pemraj* v *Narayan*,[10] that possession is a good title against all persons except the rightful owner and entitles the possessor to maintain enjoyment against any person other than such owner who dispossesses him [11] In one case, the Bombay High Court seemed disposed to agree with the Calcutta High Court, for in *Kalu* v *Barsu*,[12] it ruled that in an ejectment suit the defendant though a trespasser, is entitled to require the plaintiff to prove that he has a superior title But in *Tuljaram* v *Ramanji*,[13] it was said that a person sued as a trespasser cannot without proof of his own right oust an apparent owner by pointing out some defect in the title of the latter The plaintiff in another case being in possession of certain land sued for a declaration that it belonged to him He failed to prove title to the land, but proved that he had been in possession of it for ten years, and had built a shed on it *Held*, that no declaration of the plaintiff's title could be made, but that on the

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1 [illegible]

2 [illegible]

3 [illegible]oma v Narsingrao (1896)

4 Khanderao v Narsingrao (1895) 19 Bom , 289

5 Ramchandra v Ravji (1896) 20 Bom 331

6 Velu v Nilkanth (1898) 22 Bom 428

7 Wise v Ameerunnissa Khatoon L R 7 I A , 73 Prtaza Hossein v Lem Mistri (1883) 9 Calc 130 11 C L R 393 Debi Charan v Ishar Chandra (1883) 9 Calc 39 11 C L R 312 Parmeshar v Brijo Lal (1890) 17 Calc , 256 Shama Charan v Abdul Kabir (1898) 3 Calc W N 158 Kedar Nath v Raj Nath (1899) 3 Calc W N , 497 Nisa Chand Gaita v Kanchiram Bagani, (1899) 26 Calc , 579

8 Nisa Chand v Kanchiram (1899) 26 Calc 579

9 Ismail Ariff v Mahomed Ghous (1893) 20 Calc 834 , L R 20 I A , 99

10 Pemraj v Narayan (1882) 6 Bom 215

11 This was followed in Krishnarav v Vasudeb, (1884) 8 Bom , 371, and Krishnacharya v Lingawa (1896) 20 Bom , 270

12 Kalu v Barsu, (1895) 19 Bom , 803

13 Tuljaram v Ramanji (1895) 19 Bom , 828

authority of *Ismail Ariff* v *Mahomed Ghous*[1] the plaintiff was lawfully entitled to the land and the shed thereon[2]

In Madras, the rule laid down by the Calcutta High Court seemed formerly to prevail[3]

In *Lachho* v *Har Sahai*,[4] the question was raised but not decided In this suit, which was one for the possession of immoveable property *the plaintiff proved* that he and his predecessors in title had been in undisturbed possession for thirty or forty years previous to his dispossession by the defendant The defendant alleged but failed to prove that the plaintiff had paid him rent as a tenant at will *Mahmud* J before whom the case came remarked that this would go far to prove that the plaintiff's possession was adverse He also said — It seems to me that it is usually for the plaintiff who seeks ejectment to prove his title But I also hold that when possession for thirty or forty years is proved to have been peaceably enjoyed the person who has recently dispossessed such plaintiff has to meet the presumption of law that the plaintiff's long possession indicates his ownership of the property As the Lower Court had erroneously regarded the plaintiff as only a licensee of the defendant the case was remanded for disposal on the merits

Evidence of title A possession in the part of one party which is not shown to have commenced in wrong [illegible] *proof of a* superior title in another party[5] Possession [illegible] of years in the absence of evidence to the contrary *presumption* [illegible] A suit for damages for the value of fruit crops taken away by the defendant [illegible] alleged to be in the plaintiff's possession can be sustained [illegible] that the plaintiff was in possession up to the date of the institution of the suit it is not necessary for him to prove his title to the land unless the defendant shows a better title[7] A plaintiff is certainly entitled to a decree on proof of possession for more than twelve years[8]

Pre emption —A suit for pre emption must embrace the whole property[9] A purchaser takes *subject to all the equities of his vendor*[10] As to a suit for a portion of the purchase money paid into Court where the decree has fallen through[11]

Shias - See *Abbas Ali* v *Maya Ram*[12]

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[1] Ismail Ariff v Mahomed Ghous, (1893) 20 Calc, 834

[2] Gangaram v Secretary of State, (1896) 20 Bom 798

[3] [illegible] (1874) 7 M H C Rep 171 [illegible] Rep, 47 [illegible] Chand [illegible] Karchi [illegible] that possession is under the Indian as under the English law good [illegible] against all but the true owner

[4] Lachho v Har Sahai (1890) 12 All, 46

[5] Arumugam v Perriyanna, (1870) 25 W R [illegible] 16 I A, 194

[6] Ammangammanjari v Tripura Sundari [illegible] Ajudhia Kandu, (1891) 13 All, [illegible]

Lep Singh v Namar, (1894) 21 Cal, 244

[7] Uma Charan v Bishwa Nath (18[illegible]) [illegible]

[8] Durga Prasad v Munsi, (1884) 6 All, 423 [illegible] 182 and compare Kuar Dat [illegible] Singh [illegible] cases on it

[10] Durga Prasad v Shambhunath (18[illegible]) [illegible] All, 86 As regard to price see Karim Baksh [illegible] (188[illegible])

[11] Koji Ram v Ishar, (1886) 8 All 274

[12] Abbas Ali v Maya Ram, (1890) 12

Privacy—In *Bengal* it has been held that there is no right of privacy It was ruled that a right to privacy was not a right inherent to property but might be gained by prescription, grant or express local usage[2] So again in *Bombay* it has been decided that, except in Gujerat, an invasion of privacy is not an actionable wrong[3] In *Madras*, it has been laid down that the invasion of privacy by opening windows is not a wrong for which an action will lie Illustration (b) to s 18, Act V of 1882 however, points out that in those parts of India, where the Act prevails a right to privacy can be acquired by local custom and this has been held the law in the *North Western Provinces*[6] The ... of the North ... is not dependent on the ... changed the ... range of ... rights of e... legal right of suit is given to a neighbour on the other side of the road complaining of loss of privacy[7]

Privilege—A Judge is not liable for words spoken in office,[8] and the same privilege extends to letters which a Judge in this country is bound to forward to the High Court[9] No suit will lie against a Magistrate acting judicially and with jurisdiction though carelessly and irregularly[10] Nor against a political Agent[11] A counsel is absolutely privileged for words spoken[12] In *Queen v Christie*[13] it was held that a pleader or mooktear is not liable, if relying on the statement of his client he in good faith introduced defamatory matter in the pleadings and see ss 148—150 of the Evidence Act

Defamatory and libellous expressions when used by a party in the course of a judicial proceeding either in the pleadings, or the conduct of the suit are not actionable[14] And the rule in England is that neither party witness counsel jury nor judge can be put to answer civilly or criminally for words spoken in office[15] thus where a witness said that ... was a rank forgery *Held* that the statement was privileged and no action for slander would lie although the jury found that the words were not spoken by *the defendant in good faith as a witness and that he spoke them as a volunteer,*

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[1] Ram Lal v Mahes (1870) 5 B L R 6 7 (foot note) Ghulam Ali ... Zahur (1870) 6 B L R App 76

[2] Mahomed Abdur v Brij Sahu (1870) 5 B L R 676 14 W R 103 See also Kali Prasad v Ram Prasad (1872) 18 W R 14

[3] Shrinivas v Magistrate of Dharwar (1871 2) 9 Bom H C R ... 26 Mani shankar v Trikam Nars (1867 8) 5 Bom H C Rep 4 ... Keshav Hekla v Ganpat (1871) 8 Bom H C Rep A C 87 Kuvarji ... Bai Javer (1870) 6 Bom H C Rep A C 143

[4] Azuf v Ameeru (1895) 18 Mad 163

[5] Lachman Prasad v Jamna Prasad (1888) 10 All 162 Gokul Prasad v Radho (1888) 10 All 358 Abdul Rahman v Bhagwan Das (1907) 29 All 82, See also Kundan v Budhu (1907) 29 All 64

[6] Abdul Rahman v F... (1894) 16 All 69

Joogul Lal ... Jas la 3 N W 311

[7] Seaman v Netherclift 1 C P D 540 2 C P D 53 and cases thereon cited Taman Nayar v Sultan ... (1894) 17 Mad 87 Nanda Lal Mitter (1899) 3 C W N 39

[8] Ally Kurreem v Nawab ... 1 Bom ... 1

[9] Collector of Hooghly v Tarak Nath (1871) 7 B L R 449

[10] Inhabitants of Mahal ... v Anderson (1871) 7 B L R 452 note

[11] Seaman v Netherclift 1 C P D 540 Sullivan v Norton (1887) 10 Mad 28

[12] Queen v Christian 2 All H C 473

[13] Nathji v Lalbhai (1890) 14 Bom 97

[14] Rex v Skinner, 1 Lofft 55

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... laint as an ... taken at the fir... cannot ...

... ry right of privacy which prevails in various parts ... Provinces is a right which attaches to property, an... he documents ... was refused for default of ... a suit will lie to enforce ... that a document ... under ss 77 and 24 ... ing of loss of privacy[7] ... lie to set aside such an order ... perty is lost within the time allowed ...

Privilege—A Judge is not liable ... purchaser may bring a suit against the ... same privilege extends to letters ... registration of a fresh deed[8] ... ward to the High Court[9] ... ng.—It is doubtful if the Courts have any jurisdict... cially and with ...

... temporal suit cognizable[14] But a Civil Court can adjudicate on a right of exclusive worship of an idol at a particular place set up by a caste,[15] and a suit will lie for an office, even although there are no fees attached,[16] or to declare an exclusive right to perform a certain portion of religious worship in a Hindu temple and to recover dues, not voluntary offerings, for certain religious services performed, and if to determine the right thereto it becomes necessary to determine incidentally the right to perform certain religious services, the Court has jurisdiction to do so,[17] and an injunction will be given against a person interfering with a right to give a crown and water at a religious festival.[18]

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1 Abdullah Khan v. Janki, (1894) 16 All, 303, Ramghulam v. Chotey Lal, (1879) 2 All, 46

2 Topi Bibi v. Ashanullah, (1889) 16 Calc, 509, Abdul Aziz, in re, (1887) 11 Bom, 691

3 Palaniappa v. Periakaruppan (1894) 17 Mad, 262

4 Raj Lakhi v. Debendra Chandra, (1897) 24 Calc. 668, 1 Calc W N., 444

5 Kudrathi Begum v. Najibunnessa (1898) 25 Calc, 93

6 Lullock Chand v. Gokulbhoy, (1897) 21 Bom, 724

7 Gangava v. Sayava, (1897) 21 Bom. 699.

8 Nallappa v. Ramalingachi, (1897) 20 Mad, 250

9 Namboory Seetapatty v. Kanoocolanoo, 3 Moo I A, 359

10 Raj Coomari v. Nobo Comar, 1 Boulnois, 137

11 Vasudev v. Vamanji, (1881) 5 Bom, 80

12 Sriman Sadagopa v. Kristna, (1862) 1 Mad H C, 301, Karuppa v. Kolanthyan (1884) 7 Mad 91

13 Subbaraya v. Velanta Chariar (1905) 28 Mad, 23

14 Kaoni v. Mahomed (1907) 30 Mad, 15

15 Anandrav v. Shankar Daji (1883) 7 Bom 323

16 Hashim v. Huseinsha (1889) 13 Bom, 429, Mamat Ram v. Babu Ram (1888) 15 Calc, 159.

17 Tiru Krishnama v. Krishnasawmi I. R. 6 I A 120, (1878) 2 Mad, 62, (1882) 5 Mad 313 Kali Kanta v. Gouri Prosad (1890) 17 Calc, 906 Limba v. Rama, (1889) 13 Bom, 548 Jagannath Charan v. Akali Dassia, (1894) 12 Calc, 463

18 Srinivasa v. Tiruvengada, (1888) 11 Mad, 450

also a suit by a Hindu for a perpetual injunction forbidding the Mahomedans to resort to a *ghat* on the Ganges and for a declaration of right to use it for religious purposes, will not lie [1] A right to officiate at funeral ceremonies is incapable of transfer and a suit in respect of it will not lie [2] A suit for a right of easement over a *ghat* used for religious purposes was held to be maintainable and defendants were restrained from using it for trading purposes [3] A suit will lie for the exclusive right to the privilege of administering *Purohitam* to pilgrims restoring to *Rameswaram*,[4] as also a suit by worshippers to restrain a superintendent of a mosque from using it for purposes other than those for which it was intended to be used [5] and a suit to restrain interference with a right of devotion in a mosque [6] An *imam* of a musjid can bring a suit for a declaration that he has a right to deliver an oration on a Friday [7] and a suit by members of a certain sect of Mahomedans calling themselves *Wahhabis* for a declaration that they are entitled to worship in a certain mosque and pronounce a particular word is maintainable [8]

Marriage—A suit by a Hindu mother, as the guardian of her infant daughter for a declaration that the alleged marriage of her daughter with the defendant was null and void, is a suit of a civil nature which may be entertained in a Civil Court [9]

Fees—Where no fees are of right appurtenant to the office of *Chalvadi* but gratuities may be given to him no action for these as money had and received will lie against an intruder in the office,[10] nor even if there are fees if the decision of the question by the Courts would interfere with the autonomy of the caste [11] But in Bombay a suit for damages by a village priest against an intruder who deprives him of his fees will lie,[12] or against a *jajman* who has employed and paid another to perform certain ceremonies to recover the amount of the fees which would be payable to plaintiff had he been called in [13] otherwise in Madras,[14] and the *vatandar joshi* of a village has an action for damages against an intruder in the office who has received fees properly payable to the former, but an injunction will not be granted to restrain the intruder from acting [15] A suit will not lie to compel *jajmans* to employ a particular *purohit*, though if certain *purohits* are employed, a suit by one of them or his representative will lie against the others for declaration of his right to enjoy the profits [16] if based on contract or prescription by long and uninterrupted usage [17] and a suit will lie to declare the right to break a curd pot in a certain part of a temple

[1] Shah Muhammad v Kashi Das (1885) 7 All 199

[2] Jhummun Pandey v Dinonath (1871) 16 W R, 171

[3] Juggmoni v Nilmoni (1883) 9 Calc, 75

[4] Ramasawmy v Venkata (1874) 2 W R, 21, P C 9 Moo I A, 344

[5] Abdul Rahman v Yar Muhammad (1880) 3 All 636

[6] Jawahra v Akbar Hussain (1885) 7 All, 178
Fazl Karim v Maula Baksh (1891) 18 Calc 448

[7] Jangu v Ahmadullah (1891) 13 All, 419

[8] Anjona v Proladh Chunder Ghose (1870) 14 W R 132 *id*, 403 see Gasper v Gonsalves (1873) 13 B L R, 109

[10] Shankara v Hanma (1878) 2 Bom 470

[11] Murari v Suba (1882) 6 Bom 725

[12] Vithal Krishna v Anant (1874) 11 Bom H C, 6

[13] Dinanath Abaji v Sadashib (1879) 3 Bom, 9 Waman v Balaji (1890) 14 Bom, 167

[14] Ramakristna v Ranga (1884) 7 Mad 424

[15] Rajaramlad Shivappa v Krishnabhat (1879) 3 Bom 232

[16] Beharee Lall v Baboo, 2 Agra 80 Becharam Banerjee v Thakurmoni Debi, (1868) 10 W R 114 Kedra Ojha v Deo Panee (1866) 5 W R, 222, Magju v Kamdyal, (1871) 8 B L R, 59

[17] Krishna Aiyan v Anantarama Aiyan (1864) 2 Mad H C, 330, Ramasami Aiyan v Venkata Achari, 6 Moo, I A 348

against the Collector's order under section 11 of that Act for also a suit by a Hindu account with the recorded sharer of a joint estate,[1] as also a to resort to a ghat ... a sale for arrears of road and public cess without any previous for religious purpo Commissioner [2] and an order of the Revenue Courts may be revers is incapable of the Court,[3] but an order of a Revenue Court directing ejectment of a a right of easeme fusing to accept a pattah cannot be set aside in the Civil Court[4] and maintainable recover possession of lands which have been added to an estate by the A suit will lie authorities is not maintainable although such lands may have reformed to pilgrim an old site of land belonging to another [5] nor will a suit lie to set aside a sup sale made by a Collector in execution of a certificate for arrears of which cesses, when there was an unsatisfied arrear at the time of the sale [6] A rig suit will lie in the Civil Court to set aside an order passed in Survey de proceedings initiated under Bengal Act V of 1875, when they are undertaken for settling the boundaries of private property and not for some public purpose[7] and a suit to set aside an order passed by the Collector cancelling a sale held under Sec 326, C P C, (old code) is maintainable [8]

Khoti Settlement Act—When entries of the rent payable by occupancy tenants have been duly made under s 17 of the Khoti Settlement Act (Bombay Act I of 1889) they are final and conclusive evidence of the tenant's liability which it is not open to a Civil Court to question [9] But this does not apply to an entry of a Survey officer specifying that an occupant, not a *dharekri* or privileged occupant should pay assessment and local fund cess only for the lands in his possession[10], nor to the decision of a Survey officer determining the tenure on which a survey number is held and which can be reversed by a competent Court[11], but it is binding upon the parties affected by it until reversed or modified [12] The Khoti Settlement Act does not make the decision of rent final S 17 only makes the entry, which is the result of the decision final and conclusive evidence An appeal lies from the decision which can be revised under s 211 of the Land Revenue Code (Bombay Act V of 1899)[13] A decision of a Survey officer as to tenure is not final and when a Survey officer has entered the defendants in the Survey register as occupancy tenants, a suit will lie at the instance of the *Khots* of the village to obtain a declaration that the lands were held by them on the *dhara* tenure, and that the defendants were ordinary tenants [14] So an entry by a Survey officer that an occupancy tenant holds the land rent free is not final [15]

North West Provinces Rent Act—No suit will lie against a landlord in a [illegible] hich [illegible] they [illegible] the [illegible] nants at fixed rates and the plaintiffs merely as mortgagees, and they asked for a decree

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1 Hurgobind Das v Barolu Prosad, (1870 1) 6 B L R, 614

2 Mohibul Huq v Sheo Sahay Singh (1898) 25 Calc, 85

3 Nanku Roy v Mahabir Prosad, (1869) 3 B L R, App 35

4 Ragava v Raja Gopal, (1886) 9 Mad, 39

5 Ram Jewan Singh v Collector of Shahabad, (1875) 14 B L R, 221 note, (1872) 18 W R, 64

6 Troyluckho Nath v Pahar Khan, (1896) 23 Calc, 641

7 Hurri Prasad v Jumna Prasad, (1881) 6 Calc, 453

8 Bandi v Kalka, (1887) 9 All, 602

9 Balaji v Balbin Raghoji, (1897) 21 Bom, 235

10 Krishnaji Narainva v Krishnaji Narayan, (1897) 21 Bom., 467

11 Antaji Kashinath v Antaji Madhav, (1897) 21 Bom, 450,

12 Madhavrao v Dnonak, (1897) 21 Bom, 695

13 [illegible]

14 [illegible]

15 [illegible]

16 [illegible]

Revenue Jurisdiction Act —When the Government [illegible]

[illegible]

or assessment, the suit was not taken away from [illegible] by Bombay Act X of 1876 s 4 sub cl (*b* [illegible] When [illegible] remuneration of a *[illegible]*, and the amount was [illegible] *inamdar*, by attachment of his property, *held* that [illegible] increase the *[illegible]* remuneration and that the [illegible] amount illegally levied from him was not barred by [illegible] order by a Collector removing A's lands from his *khata* [illegible] B's *khata* does not by itself amount to a forfeiture of [illegible] suit by A to recover such land from B being simply a [illegible] for the purpose of establishing a private right [s 4 (c) [illegible] bar the jurisdiction of the Civil Court[4] The bar of [illegible]

[illegible]

tiff to prove that he has previously to bringing the suit preser[illegible] allowed by the law for the time being in force as [illegible]

[illegible]

entertaining it by s 4 [illegible] (Bombay Act X of 1876) [illegible]

[illegible]

[2] Gangadhar Hari *v* Morbhat, (1894) 18 Bom , 525
[3] Anant Charya *v* Secretary of State, (1895) 19 Bom , 581
[4] Bhau *v* Hari (1896) 20 Bom , 747
[5] Haribhai *v* Secretary of State, (1896) 20 Bom , 764
[6] Narayan Ballal *v* Secretary of State (1896) 20 Bom , 803
[7] Ranchhod *v* Secretary of State (1898) 22 Bom., 173.
[8] Abaji *v* Secretary of State, (1898) 22 Bom , 579
[9] Ranchhod *v* Secretary of State, (1898) 22 Bom , 583
[10] Budho *v* Keso, (1897) 21 Bom , 773
[11] Trimbak *v* Secretary of State, (1897) 21 Bom , 681

tainable for recovery of the amount of stamp duty and penalty which plaintiff was compelled to pay on an instrument which the defendant was bound to pay under the Stamp Act [1]

Right to Sue — The assignee of a mere right to sue for damages has no cause of action [2] Thus, the purchaser of a right to sue for mesne profits cannot sue for them [3] see also note under s 60 cl (e)

Secretary of State — No action lies against the Secretary of State in respect of an act of State or of Sovereignty No action can be based on any libel however malicious, contained in a resolution of Government [4]

Torts — The failure of an injured party to institute criminal proceedings does not deprive him of his right to bring a suit in the Civil Court to recover damages [5]

User — Mere user will not support a claim to exclusive possession [6]

Voluntary Associations — See *Advocate General* v *Devaker* [7]

Voluntary Payments — Voluntary payments give no cause of action Thus, where A paid money in his own name to stay a decree against others, he could not get it back [8] And where A a purchaser of B's title and B were afterwards sued for arrears due by B, and A paid to save the tenure from sale it was held he could not sue B for it—*Imam Buksh* v *Hridymonee* [9] So also a shareholder voluntarily paying in arrear of revenue for a defaulting co sharer who has a separate account under s 13 Act XI 1859 cannot claim to be reimbursed by the defaulter [10] There is no general rule of equity to the effect that whoever having an interest in an estate makes a payment in order to save the estate obtains a charge on the estate and therefore in the absence of a statutory enactment a co sharer who has paid the whole revenue and thus saved the estate does not by reason of such payment acquire a charge on the share of his defaulting co sharer [11] A having obtained the right title and interest of B in execution paid in a sum of money in another execution against C in which the interest of B and the sons of C was attached *Held* that as there was nothing to show how B could be liable for C's debt the payment of A was voluntary and he could not recover from B [1] A obtained a decree against C and D C had as guardian of a minor got a decree against A for a certain sum and A deposited the amount but withdrew it in execution of his suit against C and D Subsequently, C sued D for contribution on the ground that she had repaid her minor son the sum taken by A *Held* it was a voluntary payment [13] In both the cases just cited, the Privy Council decision in the case of *Fatima Khatoon* v *Mahomed*

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[1] Reference under Stamp Act (1881) 11 Mad 40

[2] Pragi Lal v Fateh Chand (1883) 5 All, 207

[3] Shyam Chand v Land Mortgage Bank, (1883) 9 Calc 695 p 697

[4] Jehangir Cursetji v Secretary of State (1903) 27 Bom, 189

[5] Sreenath Mookerjee v Komul Kurmokar, (1871) 16 W R 83 Shama Churn Bose v Bholanath Dutt (1866) 6 W R, Civil Ref, 9, Chottumo Paramanick v Zumiroodee (1872) 18 W R, 27, Abdul Kawder v Muhammad Mera, (1882) 4 Mad, 410

[6] Hussain Ali v Matukman (1884) 6 All, 39

[7] Advocate General v Devaker, (1887) 11 Bom, 185 see also Dawkins v Antrobus, 17 C D, 615

[8] Abdool Wahab v Drummond, (1865) 2 W R Act X, 48

[9] Imam Buksh v Hridoymonee (1868) 10 W R 446 but see s 69 of the Contract Act, and Ajudhia Prasad v Lakar (1883) 5 All, 400

[10] Kishen Chunder v Muddun Mohun, (1867) 7 W P 365

[11] Kinu Ram v Mozaffer Hosain (1887) 14 Calc, 809, Seth Chitor v Shib Lal (1892) 14 All, 273

[12] Collector of Shahabad v Ram Buddun, (1868) 10 W R, 400

[13] Rajlakhi Debi v Taramani 2 B L R (A C), 281, (1869) 11 W R, 218

Jan Chowdhry,[1] was discussed and held not to apply In that case a family estate was about to be sold under a decree against A's husband A had a lien for dower on the estate, and, after vainly opposing the order to sell, deposited the amount decreed in Court under protest and with a declaration of bringing a regular suit to set aside the sale order, but she agreed that the sum should be handed over to the decree holder *Held*, that the deposit into Court was to prevent a sale that would be injurious to A's rights, and the only voluntary act was the consent given that instead of the money remaining in Court, it should be paid over until the rights of the parties could be determined, and was not a voluntary payment[2] Payment of the putni rent by the mortgagee of the taluk in order to avoid a sale for arrears of rent is not a voluntary payment, even though the mortgagee has inserted in the mortgage deed a stipulation for his protection in case such a sale should take place[3]

No suit for *wasilat* lies in respect of profits derived from offerings to an idol They are in the nature of voluntary payments intended for the person performing the worship[4]

Water Cess A suit will lie for the recovery of water cess levied from a [illegible] of water, and on whose lands [illegible] time to time, but from which [illegible] under s 48 *of the Irrigation* [illegible] jurisdiction of Civil Courts in a suit for the determination of the legality or otherwise of such levy depends upon whether the incidence of the rate is authorized by the provisions of the section Under it the condition precedent to levying the rate is not the fact ascertained by evidence whether the water in dispute has percolated from the canal, but the opinion of the Canal officer that it has so percolated, he and not the Civil Court being made the judge of such percolation for the purposes of the Act[6] A landholder has a right to charge water cesses when his tenant cultivates a wet crop on dry land by means of water taken from the landlord's tank[7] In the United Provinces, under the Land Revenue Act, XIX of 1873, and Act VIII of 1873, no suit lies in a Civil Court to recover payment alleged to have been made in respect of irrigation dues in excess of what was properly leviable[8]

10 No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of

Stay of suit

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[1] Fatima Khatoon v Mahomed Jan Chowdhury, (1867 67) 1 B L R P C 24; (1868) 10 W R, P C, 29, 12 Moo I A 65

[2] Dooli Chand v Ram Kishen, L R (1880 81) 8 I A 93 (1881) 7 Cal, 648

[3] Mohesh Chunder v Ram Prasunno (1879) 4 Cal 510 As to what amounts to a voluntary payment see Sreenarain Bagchi v Smith (1879) 4 Cal 807, [illegible] 12 W R 462 Smith v Dinonath, [illegible] (1878) 3 Bom 247 Jassatsingji v [illegible] See however Nathuram v Shoma, [illegible]

[4] Kashi Chandra v Kailash Chandra (1879) 3 Cal W N 270 (1890) 26 Cal, 356 See also Rameshar v Jehan Chandra (1868) 10 W R, 457

[6] Krishnayya v Secretary of State (1890) 19 Mad, 21.

[6] Balvant G. Oze v Secretary of State, (1898) 22 Bom, 377

[7] Thayammal v Muttia, (1887) 10 Mad, 292

[8] Balwant Singh v. Secretary of State, (1900) 22 All, 139

British India established or continued by the Governor General in Council and having like jurisdiction, or before His Majesty in Council

Explanation —The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action

This section applies to H C and Prov S C C

It reproduces with slight modifications in the wording, Section 12 of Act XIV of 1882

Proceed with the trial of—These words replace the word "try" and dispose of the argument put forward under the corresponding section of Act XIV of 1882 that it prohibited the *institution* of a second suit In a suit for money the defendant had admitted money dealings but averred that the taking of an account would shew that the plaintiff was indebted to him The Court dismissed the suit but decided to take an account against the plaintiff holding that he was not precluded by this section from suing for an account while the plaintiff's suit was pending [1] Here the words are still more clear and it may be taken that this clause does not bar the *institution* of a second suit if the law requires such institution

Previously Instituted When two suits are pending in different Courts regarding the same subject matter priority of time is the proper guide in [illegible] o proceed Thus A who was employed [illegible] gainst B for the balance of an account [illegible] l A in Calcutta for an account, and for [illegible] It was held that the latter suit must [illegible] na for one year does not bar a suit for that for another [3] In a Madras case[4] it was held that a proceeding under section 244 (section 47 of this code) was not a suit within the meaning of the corresponding sections of Act XIV of 1882

Foreign Court —The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree [5]

11 No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Res judicata

Explanation I —The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto

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[1] [illegible] (1897) 2 Mad 418 Nemaganda v Paresha (1898) [illegible] mbaram (1898) 21 Mad, 18, Pansgit [illegible] W N, 720 But see Jagat Tarini v [illegible]

[3] Meckjeo Khetsee v Devachund (1879) 4 C L R, 282

[3] Lalkishan v Kishan Lal, (1889) 11 All, 148

[4] Venkata v Venkata Ram, (1899) 22 Mad 256

[5] Fakharudin v Official Trustee, (1881) 7 Calc, 82

Explanation II—For the purposes of this section the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court

Explanation III—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other

Explanation IV—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit

Explanation V—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused

Explanation VI—Where persons litigate *bonâ fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating

Act XIV of 1882, section 13

This Section applies to H C and Prov S C C

Res Judicata—The section remains substantially as enacted in 1882 and in effect reproduces the old established law of England relating to Estoppels by record The principle underlying this provision is long since settled A matter once put in issue tried and decided in a competent Court of Justice ... yet by persons privy ... ement, it presents ... t on this Bill the ... omplete exposition ... narrow limits[3] ... cases we cannot yet dispense with a consideration of the older authorities

Since its first authoritative exposition in the Duchess of Kingston's case in the year 1776, a vast number of decisions of the Courts, both in England and

[1] The reason of this rule can scarcely be expressed more clearly than it is in the two time h ... *curiae quod sit* ... *litium* (No ... be for one an ... there should b ... Duchess of K ... also very clearly expressed

[2] West J in Shridhar Vinayak *v* Narayan Babaji (1874) 11 Bom H C R at p 228

[3] The section is not complete or exhaustive of the effect of Res Judicata Ramlal *v* Chhabnath (1890) 12 All, 578 Ram Kirpal *v* Rup Kuari, (1884) L R 11 I A 37 It does not deal with the case of judgments *in rem* Secs 13 41 42 Evidence Act nor with that of parties represented by, though not claiming under the parties to the former suit Ahmed Bhoy *v* Vullee Bhoy (1882) 6 Bom, 703, but as to this last matter, see Jogendro *v* Funindro (1872) 14 Moo I A, at p. 376.

in India, have been recorded in illustration of this principle of Res Judicata These decisions are by no means easy of comprehensive analysis and various arrangements have been adopted by authors of Indian text books Having before us in this work the single purpose of assisting in the interpretation of the text it will be perhaps convenient to closely follow the wording of the section Every plea of Res Judicata made under this section must be submitted to four test questions —

1 Has the matter in issue been directly and substantially in issue in another suit?

2 Was that suit between the parties now litigating or between their privies?

3 Is the Court in which that other suit was decided of jurisdiction competent to try the present suit?

4 Was the matter in issue heard and finally decided in the other suit?

Matter—The meaning of this word is rendered clear by explanation II, which embodies the rule of English law that when the allegation on the record is uncertain, there is no Res Judicata [1] Such allegations contained in statements in the pleadings may be relevant in a subsequent proceeding by way of admission, but this Explanation offers a preliminary obstacle to their operation as Res Judicata by requiring that they shall have been denied or admitted by the other party [2] If such statements satisfy this test, it will still have to be considered whether they were directly and substantially in issue or whether they were in fact immaterial or irrelevant The same explanation further excludes all *obiter dicta*, or observations of the Court upon matters not put in issue by the parties and unnecessary to the determination of the suit [3]

The first real difficulty encountered is in the meaning of the words,

Directly and substantially in issue—It seems sufficiently clear that the Courts are precluded by this section from trying not only any suit but any *issue* in which the matter to be determined has been directly and substantially in issue *in another suit* (not another suit *or issue*) between the same parties and which has been heard and finally decided by a competent Court There is seldom room for doubt as to whether the matter under discussion is directly and substantially in issue in the suit *or issue* being or about to be tried for not only the suit in course of trial itself, but any separate single issue raised by the parties thereto will be barred if the matter to be determined therein has been directly and substantially in issue in another suit The real difficulty lies in deciding the question whether the said matter was or was not directly and substantially in issue in *the former suit* The reason of this is that there may have been issues raised and tried in that former suit but not essential to the judgment or decree therein, which do not fall within the meaning of the words "directly and substantially in issue in the suit and a decision in respect of such issues cannot operate as *res judicata* The question amounts practically to this —What matters, though embodied in issues heard or determined in a former suit, may be disregarded in considering the plea of Res Judicata as falling outside the meaning of the words "directly and substantially in issue in a former suit'?

Distinction where second suit is brought on the same or on a different cause of action

This question may be separately considered, (a) In suits brought on the same claim or demand as the first suit, when the first judgment operates as an absolute bar to the second suit, and (b) In suits in which a new claim or demand is made In these last cases the other judgment amounts to Res Judicata in respect of issues essential to the

[1] Vishnu v Ramling, (1902) 26 Bom, 25 "If a thing be not directly and precisely alleged, it shall be no Estoppel" Co Litt 352 b

[2] Shama Ch Chatterji v Prosonno C Santikaree, (1879) 5 C L R, 251 —Sheo Ratan Singh v Sheo Sahai Misr, (1884) 6 All, 358, Caspersz on Estoppel 331

[3] See 2 Sm. L C 11th Ed, 731 Field's Evidence 6th Ed. 535.

decree and such ssues only[1] Tl s s clearly stated in the judgn ent of an Amer can Court reported n the La v T mes of 14th July 1877[2]

Before cons der ng the reported Ind an cases we may glance at the general rule as stated by the courts n England In the Duchess of K ngston s case[3] tl e unan mo s op n on of the Court vas tl us expressed by the Ch ef Just ce Fron the var ety of cases relat ve to judgments be ng g en n ev dence in c v l su ts these t vo deduct ons seem to follo v as generally true —first that tl e judgment of a Court of concu rent ju sd c on d ectly upo i tl e po nt s as a plea or as ev dence a bar conclus ve be ween the sa ne par e upon the same n atter d rectly n q est on n another Court secondly that tl e judgment of a Court of exclus ve ju sd ct on d rectly upon the po nt s n l ke n anner conclus ve upon the same mat er bet een the same pa t es com ng nc den ally n quest on n ano her Court for a d fferent purpose *but e ther tle j l e t of z con ur e t or excl ve ju sd ct on is ev de e of y tt r l l e ol a c ally z z q est o* though v th n the r j sd t on *or f y n atter nc d tally co n ble or of z y atter to be z fer el by rg e t fro tle j d e t* Tl ese ve y vo ds ve e quo ed n an ppe l f o le H gh Co of A lal bad[4] by tl e r Lordsh ps of tl e Pr vy Counc v o ad led There no h ng tecl n cal nor pec l a to the la v of England n the rule s so stated It v s reco n ed by tl e C v l La v an l t vas perfec ly co s en w t the seco d sect on of the Code of Procedure nder

Judgment not con clus e as to collateral n atters

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[1] See Hukm Chand on Res J d cata p 7 F eld s Ev dence 6th Ed 517

[2] Cro well v Sac 94 U S 3 l For a fuller a alys s of th s and other cases I ere n referre l to see F eld s E v 6 h Ed App B Hukum Chand on Res Jud cata In cons deri g the operat on of the prev ous judgment t sl ould e bo e m l as st te l by co n el that t e e is a l ffe e ce betwee tl e

lem d i c t ove sy concl l p rt es a l tl ose pr ty w l them not only as to e e y n atte l c as offe e l and ece e l to sust n o defeat t e c n or de nd b t as to *a y o her a lm s ble m a e h ch g t h e bee off re l fo h t j pose* (I xpla at on deals w tl s j o nt pre c sely) Il us f exan le a ju lgn e t rende ed u o a pro n sory ote s c us ve as to tl e val l ty of t e n tr ment and tl e an o nt due pon t altl ou l t be s bseq en ly alleged tl at perfect lefe es actually ex sted of l l o p oof as offered su h as fo gery want of cons le at on or pay sl ed by no legal l ngs at *language* u u a ju up u ly as to as to every grou d en appl ed to tl e av g passe l to e the p rt es n tl e seco d act on nd t e judgment

[3] 20 Ho v St Tr al 03 Sm L C 110 E l 31

[4] Kl a vleo S n r Hosse n Bux Kh (1 C 18 1) L L R 3 I W I 1 C 30

in India, have been recorded in illustration of this principle of Res Judicata These decisions are by no means easy of comprehensive analysis and various arrangements have been adopted by authors of Indian text books Having before us in this work the single purpose of assisting in the interpretation of the text it will be perhaps convenient to closely follow the wording of the section Every plea of Res Judicata made under this section must be submitted to four test questions —

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[3] See 2 Sm L C 11th Ed, 731 Field's Evidence 6th Ed, 535.

which this case was tried" This last case was decided under the first Procedure Code of 1859, but it is none the less a continuing authority for applying to the interpretation of this section the principle laid down by Sir William de Grey That principle, however, is not to be extended and since an Estoppel shuts out enquiry into the truth, it is necessary to see that the principle of *Res Judicata* is *not unduly enlarged* [1]

The rule was discussed and stated in even clearer language by Vice Chancellor Knight Bruce in the case of *Barr v Jackson* [2] Shortly, he says that a decree operates to bar any subsequent suit in which attempt is made to defeat its direct object

One Cause of Action [3]—The rule is then that where the second suit has been brought on the same cause of action as the former suit the words of the explanation are to be rigidly enforced, and litigants are absolutely barred by this section from raising new issue in support of claims already put forward and adjudicated upon by the Court, whether they omitted to raise those issues at the hearing of the first suit through negligence inadvertence, or even accident [4] To take two simple instances In *Kendall v Hamilton* A obtained judgment

[1] Rai Charan Ghosh v Kumad Chowdhry (1898) 25 Calc 571 Chandi Pershad v Maharaja M Singh (1901) 23 A 77 See Shibo Raut v Baban Raut (1908) 36 Calc , 353

[2] [illegible] This decision was overruled on appeal, [illegible] Vice Chancellor has been frequently [illegible] he law on this subject Referring to [illegible] id Lord Ellenborough certainly, and [illegible] *Morewood decided most accurately* [illegible] that action at Common Law, that an allegation on record, upon which issue has been once taken and found is, between the parties taking it conclusive according to the finding thereof so as to estop them respectively from litigating that fact once so tried and found The action however, in Outram v Morewood (3 East 346 a case of trespass the defence in which would be clearly barred by the words of this section) raised as to the same property and for the same purpose the same issue was raised and tried in the action, the judgment wherein was pleaded, and there are material points of distinction between the system of pleading of the English Courts of Common Law and those of other Courts of Justice But it is, I think, to be collected that the rule against re agitating matter adjudicated is subject generally to this restriction—that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established and however binding and conclusive the decision may, as to its immediate and direct object be, those facts are not all necessarily established conclusively between the parties and that either may again litigate them for any other purpose as to which they may come in question, *provided the immediate object of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object* This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority"

[3] [illegible] tion in 1882, and [illegible] cause of action in [illegible] lon, (1874) L. R , [illegible]

[4] Henderson v Henderson, (1843) 3 Hare, 100

[5] (1878) 3 C P. D 407 & (1878) 4 A C , 504 In Arunachala v Panchanadam, (1885) 8 Mad , 318 one S claimed to be the adopted son of M and sued A the widow of M to recover his estate A denied the adoption and the suit was [illegible] , A [illegible] was [illegible] it S [illegible] reo [illegible]

against B and C for money due to him on a joint contract, but the judgment remained unsatisfied A then sued B, C and D for the same money alleging that B and C had entered into the contract as agents on behalf of D, and it was held that the suit was barred [1] The dismissal of a suit in which the plaintiff sued the defendants as principals was held to bar a second suit on the same contract, charging the same defendants as responsible agents under a trade usage [2] But it often happens that the cause of action in the second suit, though *similar to that in an earlier suit is not in reality identical* So in *Nilmadhab* v *Brajo Nath*[3] the plaintiff had sued the defendant for the rent of certain land The defendant pleaded that part of the land was in the plaintiff's possession, but failed to prove his contention The plaintiff sued again for the rent of subsequent years, and the defendant raised the same objection *Held*, that the question was not *Res Judicata* as the cause of action being for the rent of subsequent years, was different and the question of the area of the land in the defendant's possession had not been definitely determined in the first suit

In *Modhu Sudan* v *Promoda Nath*[4] the plaintiff's predecessor in title sued a Municipality for possession of certain land on which the Municipality had stacked stones and the suit was dismissed Subsequently the plaintiff sued a purchaser from the Municipality for ejectment from and declaration of title to the same land It was held that the second suit was not barred on the ground that the plaintiff's claim to possession of the land as owner after its relinquishment by the Municipality was essentially different to his cause of action in the first suit against the Municipality, which had then maintained its right to possession under the provisions of a special Act (Bengal Act III of 1864 sect 10)

In *Abdul* [illegible] fic performan[illegible] principal defe[illegible] defendants [illegible] dants alleging [illegible] principal defendants It was held that the second suit was not barred, the cause of action in the first suit being the refusal of defendants 3 to 7 to execute the deed of sale and in the second the resistance of the principal defendants to the plaintiff's taking possession of the property

In *Bhikabhai* v *Bai Bhuri*,[6] [illegible] maintenance against one defendar[illegible] Another suit for arrears of maint[illegible] maintainable and the plaintiff's c[illegible]

In 1867 a Hindu widow obtained a decree for maintenance against her husband's co parceners but the decree created no charge on the land The family [illegible]

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[1] [illegible] R, 438, Hemendro v Rajendro [illegible]ner, (1890) 14 Bom, 408 at p 416 where the relation between the [illegible] and principal Badeley v. Con[illegible] here the obligation is not joint merely but joint and several Dhunpat Singh v Sham Soonder, (1880) 5 Calc, 291, Lawless v Calcutta L & D Co, (1881) 7 Calc, 627, Thakore Iocharji v Pujaji, (1890) 14 Bom, 31, Govinda v Mana Vikraman, (1891) 14 Mad, 284

[2] Devraav v Halanbhai, (1870) 1 Bom, 87

[3] Nilmadhab v Brajo Nath, (1893) 21 Calc, 236

[4] Modhu Sudan v Promoda Nath, (1893) 20 Calc, 732

[5] Abdul Majid v Bolla Nath Daur, (1902) 6 Calc W N, 314.

[6] Bhikabhai v Bai Bhuri, (1903) 27 Bom, 418

[7] Bangaru v Vijayamachi, (1899) 22 Mad, 175

A plaintiff, Vinayak, obtained possession of certain land from one Balu in execution of a decree of a Civil Court He then leased the land to Balu On expiry of the lease, Balu refused to vacate and Vinayak sued again for possession *Held*, that the suit would lie, since a fresh cause of action accrued to Vinayak on the refusal of the Defendant to vacate on the expiry of the lease [1]

Decrees for redemption —There has been some conflict of decisions on the question whether, notwithstanding the institution of a suit and the passing of a decree for redemption, a subsequent suit for redemption of the same mortgage can be brought when the first decree has not been executed In *Vedapuratti* v *Vallabha Valiya Raja*[2] a Full Bench of the Madras High Court considered most of the reported cases[3] on the subject at great length and held that where a suit for redemption has been instituted and a decree for redemption passed therein but not executed, a subsequent suit is *not* maintainable for the redemption of the same mortgage In this case, however, the decision of the Allahabad Full Bench in *Sita Ram* v *Madho Lall*[4] does not appear to have been before the Court In this last case the same question was fully considered and the second suit was held not to be barred It certainly seems reasonable that a mortgagor should not be placed in a worse position as against the mortgagee merely because he has obtained a decree against him

On appeal to the Privy Council in *Amanat Bibi* v *Indat Husain*[5] it was held that a suit for redemption was not barred by the dismissal of two earlier suits, one to establish a sub proprietary right, the other for possession on a statutory right.

We now come to the class of cases to which Explanation IV refers, where all possible claims have not been raised in the other suit This explanation is only applicable where the subject matter of the two suits or issues is identical[6] In the case of *Srimat Raja Periya Odaya Taver* v *Katama Natchiar*,[7] the widow of one A sued B for possession of A's estate, alleging that the property was the self acquired property of A, and that a will relied on by B was a

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[1] Vinayak v Balu, (1896) 20 Bom , 491.

[2] Vedapuratti v Vallabha Valiya Raja, (1902) 25 Mad , 300, referred to in Pandu Prabhu v Juje Lobo (1904) 27 Mad , 40

[3] [illegible]

Bombay—A decree for redemption on default of decree holder to pay money declared due by decree bars mortgagor from bringing a second suit [illegible] Savant v Narayan Dhond Savant, (1883) 7 Bom , 467 , Maloji v Sagaji, (1889) 13 Bom , 567 , and Fakirapa v Pandurangapa, (1882) 6 Bom , 7

Calc [illegible] a sale on the ground of fraud

Madras [illegible] v Somasun[illegible] Mad , 478 ; [illegible] that those may [illegible]

[4] Sita Ram v Madho Lall, (1902) 24 All , 44

[5] Amanat Bibi v Indat Husain, (1888) 15 I A., 106 ; 15 Calc , 800. And see Lutchmiput v. Land Mortgage Bank, (1887) 14 Calc , 464.

[6] Rajendra v Tarangini, (1904) 1 Calc. L. J , 249.

[7] Srimat Raja Periya Odaya Taver v Katama Natchiar, (1866) 11 Moo I. A , 50 Similarly Waleah v Saheela (1867) 8 W. R , 307 Asgur v. Nozoona (1870) 14 W R , 272; Wilaiti v Nur Khan, (1883) 5 All., 514 ; Man Singh v. Narayan, (1876) 1 All , 480.

forgery B alleged that the property was undivided family property, and that he did not rely upon A's will as a testamentary disposition The widow's claim was decreed on the ground that the property was self-acquired B then brought a suit against A to recover back possession as devisee under A's will, and this was held to be barred

In delivering judgment Lord Westbury stated the law on this point clearly [1]

Alternative claim not raised in first suit An extract from this judgment was cited with approval by the Judicial Committee in the later case of *Tekaitni Doorga Persad* v *Doorga Kunwari*[2] in which A (claiming as heiress of her deceased son) sued B for possession of an estate Defence, that B was the heir according to the Mitakshara law, and that he had been installed on the *gudee* according to ancient usage The plaintiff got a decree in execution of which she entered into possession Then B, claiming, under a family custom, to be the next heir in succession to A's son, sued A for possession of the same property, and also for a declaration that on A's death he (B) would become entitled to the property under the family custom In the second case, the plaintiff (B) denied that he had set up the family custom in his defence in the previous suit; the Judicial Committee of the Privy Council found that he had set up the family custom in the previous suit, but assuming that he had not done so, he ought to have done so, and his suit for possession was barred [3]

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[1] "The result, therefore, was that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of [illegible] the
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[illegible] that the appellant had then the [illegible]

[illegible] defendant, being in possession, resists that claim, he is bound to resist it [illegible] cording to his knowledge, [illegible] might have insisted on [illegible] of doing so, when his suit [illegible]

[illegible] the determination of the Court below"

[2] Tekaitni Doorga Parsad v Doorga Kunwari, L R., 5 I. A, 149; (1879) 4 Calc, 190 For a recent case see Rampal Singh v. Ram Prasad, (1905 P. C.) 27 All, 37; and Bihari v Sheo Balak, (1907) 29 All, 601.

[3] In support of their decision, the Judicial Committee cited Lord Westbury's *dictum* in Srimut Raja v Katama Natchiar, (1866) "When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward," and relied on the principle laid

This case illustrates the distinction with which we have been dealing between old and new claims brought forward in the second suit[1] Dealing with B's further claim that he was presumptively entitled *to succeed* on the death of A

the judgment in *Barr* v.
—"As to the second portion
o have it declared that the
ul is void and invalid as
against the reversionary heirs, the plaintiff must prove that he is the person presumptively entitled to succeed upon the death of the defendant. For although the plaintiff is barred by the former adjudication from setting it up for the purp the life of defendant No her death he, if he survi Woomatara Debia v Unn 1,500 bighas of land, alleging that they were situated outside the boundaries of her talook, but that she was entitled to them by virtue of having taken possession of the lands and brought them under cultivation The suit was dismissed A second suit by her, claiming 770 of the 1,500 bighas of lands actually lying within the boundaries of her talook, was held to be barred Clearly this alternative plea should have been raised in the first suit In *Deno Bundhoo Chowdhury* v *Kristo Monee*[3] the first suit was brought by a Hindu widow against the husband of her deceased daughter for possession of certain property, which had belonged at one time, admittedly, to the plaintiff's husband She said that the defendant claimed to hold the land under an alleged deed of gift from the plaintiff's husband to his daughter (the defendant's wife) and she alleged that the deed of gift was a forgery That suit was dismissed on the ground that the deed was genuine, and the widow brought a second suit claiming the property as the heir of her deceased daughter *Held*, that the suit was barred In a suit on a general balance of accounts the defendant omitted to claim by way of set-off certain monies alleged by him in a second suit for recovery as received by the plaintiff on his behalf The second suit was held to be barred[4]

Question decided in effect.

Where a question has been necessarily decided in *eff ct* though not perhaps in express terms between parties to a suit they cannot raise the same question in another suit in any other form

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down in Gregory v Molesworth namely that "where a question was necessarily decided in effect though not in express terms between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form"

[1] See Cromwell v Sac, supra p 83. as another suit the judgment *Judicata* in respect of findings c Risal, (1882) 4 All, 55, Mod R, 582 see page infra.

[2] Woomatara Debia v. Unnopoorna Dassee, (1873) 11 B.L.R., 158 Similarly

[3] De

petition was held to be barred Shaikh Beshzrutoollah v Ajoo, (1871) 14 W. R., 195 The same principle has been extended to many demands. Bheeka v. Bhuggoo, (1878) 3 Calc, 23 See Narhari v. Anpuranabai, (1887) 11 Bom, 160 In T. K Ummatha v Cheria Kunhamed, (1882) 4 Mad, 308, the cases of Bheeka v. Bhuggoo, 3 Calc., 23 and Denobundhoo v Kristomonee, 2 Calc, 152 were dissented from See Girdhar v Dayabhai, (1884) 8 Bom., 174 and kindred cases p 90 *infra*

[4] Jagan v. Lal, (1907) A. W. N, 275

In *Soorjomonee Dayee* v *Suddanund Mohapatter*,[1] the first suit was by the the son against his father and an intended devisee under his father's will to have it declared (in substance) that the father had no power to devise the property as it was all ancestral, or had been acquired with the income of the ancestral property The declaration was granted as to the ancestral property but the suit was dismissed as to the acquired property A second suit against the devisee after the father's death to recover possession of the acquired property was barred

In *Krishna Behary Roy* v *Brojeswari*,[2] A sued B (a putnidar) to set aside a putni granted by the adoptive mother of A (before the adoption of A), on the ground that she had only a widow's estate Defence, that A had not been adopted C intervened and was made a defendant to contest the adoption It was held that the adoption was good, but that the putni had been properly granted C appealed on the question of adoption but the decision of the lower court was affirmed and it was held, that a subsequent suit by C to set aside the adoption was barred

In *Pittapur Raj* v *Buchi Sittay*,[3] the first suit had been brought by Sittay's husband against the Rajah's father Venkata, claiming possession of the zemindary of Pittapur as the elder (adopted) brother of Venkata The adoption was denied and the suit was dismissed on failure to prove the adoption Sittaya's husband appealed but the case was compromised, and he withdrew his appeal some years afterwards he died, leaving one son who died, leaving his mother Sittaya The second suit was brought by the Rajah, claiming a declaration that he was entitled to succeed to Sittaya's son's estate on her death He based his claim on the fact that Sittaya's husband was the adopted brother of his (the Rajah's) father *Held*, that the suit was barred

But where several independent causes of action are available a party is not

Where several causes of action exist at time of first suit

[1] Soorjoomonee Dayee v Suddanund Mohapatter, (1874) 12 B L R, 304, 20 W R, 377 Similarly Gopinath Chobey v Bhugwat Pershad, (1884) 10 Calc 697 where the first suit was for possession and the second for *malikana* And Dokhyani Debi v Dolegobind Choudhury, (1894) 21 Calc, 430 where the question as to the genuineness of a kabala was held to be Res Judicata although no issue on this point was distinctly raised in the first suit

[2] Krishna Behari Roy v Brojeswari, (1875) L R, 2 I A, 283, 1 Calc, 144 Similarly Gobind Chunder v Taruk, (1878) 3 Calc 145, Bemola Soondury v Punchanun, 3 Calc, 705, Ram Krishna v Vithal (1891) 15 Bom, 89, and Toponidhee Dhirj v Sreeputty, (1880) 5 Calc, 832

[3] Sittapur R [illegible] Similarly Fekait [illegible] Venkata [illegible] v Ped [illegible] Ashutosh Dhur, [illegible] Kishan Lal (1[illegible] Mookerjee, (1887) [illegible] (1890)

[illegible] it had the Court [illegible]

[4] M [illegible]

dismissed on the ground that no tenancy was made out a second suit to eject the defendant as a trespasser was held to be maintainable [1]

In *Girdhar v Dayabhai* [2] A sued B for possession of certain land alleging that he had let B into possession under a written lease, which lease had been determined Defence, a permanent tenancy at a fixed rent The letting relied on by the plaintiff was not proved and the suit was dismissed A was allowed to bring a second suit, claiming possession of the land as the owner thereof on the ground that the specific rights on which the plaintiff relied in the two suits were different and would have to be proved by different evidence

Previous Suit basis of second suit —A second suit on the same cause of action as another suit will not be barred where the state of facts found to exist by the judgment in that other suit forms the basis of the second suit, the other having been dismissed because it was wrongly framed or premature [3] So where the Court found a state of facts, which would have entitled the plaintiff to relief had he framed his suit properly, a second suit claiming that relief has been held to be maintainable [4]

Tewari v Purbhoo, 12 C W N, 292 There may have been no obligation in the first suit to take the ground urged in the second suit, Khirodamoyi v Bagala (1906) 4 Calc L J, 402

[1] Kl [illegible] m v Ram Krishto (1866) [illegible] W R 900 In Ananda [illegible] tenant B and B s alleged [illegible] at he was in possession [illegible] dismissed as against him *Held*, that a second suit for possession *against C and D was not barred* Plaintiff brought a suit for rent against defendant, who denied that he was the plaintiff's tenant and pleaded that a third party was his landlord The rent suit having been dismissed the plaintiff sued both the defendant and the third party for a declaration of his title and for recovery of rent from the defendant *Held* that the suit was not barred by *res judicata* Dwarkanath v Ram Chand (1899) 26 Calc 428 3 Calc W N 266, foll in Nitya N Sarkar v Ram Narain Das (1902) 6 C W N 66 In Shridhar Vinayak v Narayan Dabaji (1874) 11 Bom H C Rep 224 a suit for ejectment was held to be no bar to a subsequent suit as mortgagor to redeem, followed in Naro Bavant v Ramchandra (1889) 13 Bom, 326 Achuta v Achuta, (1898) 21 Mad, 35 See also Girdhar Manordas v Dayabhai (1884) 8 Bom, 174 and Nilo Ram Chandra v Govind Ballal, (1886) 10 Bom, 24 Where the first suit was upon a *jamabandi* for rent and the second for measurement and abatement (Raghoonath Mundul v Juggut Bundhoo Bose (1881) 7 Calc, 214, 8 C L R 393) where the first suit was for rent at a certain rate, the second for enhancement after notice Gopee Mohun Mazumdar v Hill (1878) 3 Calc, 789, see also Ekram Mundul v Halodhur Pal, (1878) 3 Calc, 271 Where the first suit was brought to recover property [illegible]

[2] G [illegible] lar decisions see Gobind v. [illegible] Umrao, (first claim under a [illegible] C, 60, Sadaya Pillai v [illegible] ttan Chetti, (1882) 4 Mad, 224, Sheo Ratan Singh v [illegible] pusha, (1884) 7 Mad, 264; [illegible] v Govind, (1886) 10 Bom, [illegible], Amanat v Imdad Hosein, [illegible] Balvant v Ram Chandra, (1889) 13 Bom, 326; Zamorin of Calicut v Narayab (1899) 22 Mad, 323

[3] See notes on "finally decided" *infra*

[4] Varathayyangar v Krishnasami, (1887) 10 Mad, 102 and Ramkristo v Nemy Churn, W. R., 1864, p 110 In Watson v Dhorendra, (1878) 3 Calc, 6, the first suit was for use and occupation, the second for rent under a lease In Shivram v. Narayan, (1881) 5 Bom, 27 and Konherrav v Gurrav, (1881) 5 Bom, 589, the first suit was for possession, the second for partition. In

Fresh cause of action.—The cases in which the question whether the claim in the second suit was identical with that in the prior or other suit are dealt with under the heading of "*Identity of subject matter*," p 92 *infra*

Suits upon a different Claim.—Coming now to the second class of suits referred to by Field J in Cromwell v. Sac (p 80 *supra*) we find that they may be roughly divided into two classes according to the arguments employed to exclude them from the operation of the section

I That the matter in issue in the suit or issue being heard was only incidentally or collaterally in issue in the prior or other suit II That the matter in issue in the second suit is not the same matter as was directly and substantially in issue in the other suit

Collateral findings do not operate as Res Judicata

I Where the Court comes to a finding upon an issue, which is not necessary to the decision of the suit, such finding cannot be relied upon even if inserted in the decree, to operate as Res judicata in a subsequent suit wherein such issue is again raised [1]

And where a decree is couched in general terms, the extent to which it ought to be regarded as Res Judicata can only be determined by ascertaining *what were the real matters in controversy* [2] *In order to effect this*, the pleadings[3] as well as the judgment[4] in the other suit must be looked at, and it has been laid down in a Privy Council case[5] that to support the plea of Res

Chooneelal v. Munnoo (1870) 13 W R [illegible]
the second to set aside a sale in execu[illegible]
13 Bom 326 the first suit was to re[illegible]
Sheoraj v. Rajcoomar (1883) 24 W R
396 First claim of permanent tenure
ance not *res judicata* Mann v. Kainav[illegible]
under 'finally decided' *infra* First, suit for possession second, suit for possession subject to redemption of mortgage debt, set up by defendant and held to exist in the first suit Zinat un nissa v. Rajan (1905) 27 All, 142

[1] Gh[illegible]

Calc 923 Modhusudun v. Brae (1889) 16 Calc 300

[2] Amriteswari Debi v. Secry of State (1897) 24 Calc. 504, 1 Calc W. N. 249; see Ialasutram v. Bommadevara (1905) 29 Mad., 42

[3] Robinson v. Dhuleep Singh (1879) 11 C D 798 Houstoun v. Marquis of Sligo (1885) 29 C D 448

[4] Kali Krishna v. Secry of State (1889) 16 Calc 173; L R, 15 I A 186; Sir Raja Rau Lakshmi Kantavammi v. Inuganti Rajagopa (1898) L. R 25 I A. 102; 2 Calc. W. N 337

[5] Mirza Kurratulain v. Nurhat ul dowla (1905) 9 Calc W. N. 938.

Judicata on this ground the proceedings in the former suit must be in evidence A judgment passed in the previous proceedings, showing what the judge understood to have been the question for decision is not sufficient as the Court must be able to say for itself that the matters in issue in the suit were in issue in the other proceeding

In *Shivram v Narayan*[1] the first suit proceeded on a previous partition which was admitted by the defendants, the only dispute being as to whether the portion claimed by the plaintiff had been allotted to him The Court found that no partition had taken place and dismissed the suit but it was held that a subsequent suit for partition was not barred

Suits for rent. The decision of title in a rent suit does not operate as *Res Judicata* where such question was raised incidentally only,[2] but if the finding on that question was in fact the basis of the decision in the rent suit, it will bar a subsequent suit raising the same question for a different purpose

Indentity of Subject Matter—The plea of *Res Judicata* has been frequently raised in cases where the two suits were not brought in respect of the same subject matter, and the rule upon this point is that it is the matter in issue and not the subject matter of the suit that forms the essential test of Res Judicata [3] The applied As to orders in execution, etc, which are binding

Matter of two suits not identical.

[1] Shivram v Narayan, (1881) 5 Bom 27 and see Konerrav v Gurrav (1881) 5 Bom, 589 In Sheoraj Rai v Kashinath (1885) 7 All 247, the matter in issue in the second suit was raised by the defendant (also the defendant in the first suit) in his written statement in the first suit, but had no bearing on the claim made by the plaintiff therein. See also Gooroo Churn v Brija Nath (1883) 24 W R 111, Thakore Becharji v Pujaji (1890) 14 Bom 31 The decree in a suit gave the plaintiff an unrestricted right to the property claimed by him

d it was stated that the of the property decreed ng the decree into con was affirmed in appeal quent suit between the same parties relating to the same property, could not plead the finding in their favour in the judgment as constituting *Res Judicata* in the face of the clear wording of the decree In Irajit Prasad v Bichha Rai (1893) 15 All 3

[2] Srihari v Khitish Chunder (1897) 24 Calc 569 1 Calc W N 509 Dwarkanath v Ram Chand (1899) 26 Calc 428, 3 Calc W N 278, referred to Sahadeb v Ram Rudra Haldar (1906) 10 Calc W N 820 Nityananda Sarkar v Ram Narain Dass (1902) 6 Calc W N 66, Mohommed Afsuruddin v Peerchunder (1882) 8 Calc 470, and see p. 93 infra See Rajendra v

[3] c 756, Kasiswar ik Chundra Pal v unchanun (1878) 3 C. L R 33 and Gobind Chunder v Taruck Chunder (1878) 3 Calc, 145.

Administration. The Allahabad High Court in determining under Sec 19 Act V of 1881 whether certain persons were entitled to letters of administration with the will annexed, construed the testator's will The testator's widow who had unsuccessfully opposed the grant of Letters of Administration sued land's will *Held*, that the a suit and that the finding cond suit was not barred,

Adoption A plaintiff's alleged adoption was decided not to be a fact and the suit was decreed on other grounds. *Held*, no *Res Judicata* on the question of adoption as he could not have appealed from the decision of the first Court on this point Where no opinion was expressed in the former suit as to the construction of a document the decision therein could not have the force of *Res Judicata* Krishnan v Velu, (1891) 14 Mad, 301. See also Raman v Shathanathan, (1891) 14 Mad, 312

matter in issue in a suit is quite distinct from the subject matter[1] Thus, in a suit for a certain piece of land if the whole question of the plaintiff's title is raised and decided, the decision would be conclusive between the parties as to every portion of land held under the title[2] The same identical question must have come in question already in a Civil Court of competent jurisdiction, have been controverted and finally decided[3] And this must appear from the record; an estoppel cannot be founded on a notice of claim for restitution of money where the notice does not specify the nature of the claim[4]

Recurring Liabilities—In cases of a recurring liability the general rule of law may be thus stated Where a recurring liability is the subject of a claim, a previous judgment dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as Res Judicata, but if such previous judgment does negative the title itself, the plaintiff cannot re agitate the same question of title by suing to obtain relief for a subsequent item of the obligation[5]

Suits for rent.—Where in a rent suit the judge tries and gives judgment on the question "what is the yearly rent?" and makes that the foundation of his

[1] See Sitanath v Basadeb, (1905) 2 Calc L J, 540

[2] Nund Kishore v Huree Pershad, (1870) 13 W. R, 64 The leading decision on this point is Pittapur Raja v Buchi Sittaya, (1885) 12 I A, 16 and see Sundhya Mala v Dabi Churn, (1881) 6 Calc, 715, Ananta Bala Charya v. Damodhar, (1889) 13 Bom, 25, where a decision as to one piece of land was

sued to set aside a sale held in execution of a decree for arrears of rent obtained against her, it was held that a s [illegible] for recovery of possession of the [illegible] as the previous suit was for the female heir, while the subsequent estate vested in the reversioner— 285

[3] Parsotam Gir v Narbada Gir, (1899) 3 Calc., W. N., 517.

[4] Narayana v Gopalabrisuna, (1905) 23 Mad., 335.

[5] [illegible]

judgment, that decision is Res Judicata between the parties on the question as to the rate of rent[1] but unless that question is clearly in issue the decision will not so operate [2]

Questions of law—In determining whether a matter is *Res Judicata* by reason of a previous judgment, the question is not whether that judgment was right, but whether it did or did not finally decide the matter in issue [3] It is immaterial whether the decision is or is not sound law,[4] or that it has been disapproved in a later case by a higher authority [5] An erroneous decision on a pure question of law in a previous suit may operate as *Res Judicata* [6] But it has been held that when a decree has been set aside on appeal no issue determined by that decree can operate as *Res Judicata* even if the Appellate court disposes of the case on other grounds [7]

In a former suit.—See note to Explanation I p 105 post A Full Bench of the ... ule of *Res Judicata* contained in the ... applied equally to appeal and mis ... Applying this rule in the case of ... Court held that ... he other appeal [9] ... and although it ... *dicat* ... should be

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[1] ... Behari Lhagat v Pargun ... a decree for cesses consult ... and Beni Pershad Koeri

[2] In Balaram Mondul v Kartick Chandra Roy, (1900) 4 Calc W. N, 161, ... vious decision in a suit for rent cannot operate as Res Judicata in a subse ...

Tarangini (1904) 1 Calc L J, 218

[3] Parsotam Gir v. Narbada Gir, (1899 P C) 3 Calc W N, 517

[4] Phundo v Jangi Nath (1893) 15 All, 327 dissenting from Parthasaradi v Chinna, (1882) 5 Mad, 304

[5] Gouri Koer v. Audh Koer, (1884) 10 Calc, 1087

[6] Rai Churn Ghose v Kumud M D Chaudhuri, (1897) 1 Calc W N, 687, reviewed on another point (1898) 25 Cal, 571 2 Calc W N, 297 and see p 104 post.

[7] Nilvara v Nilvara, (1882) 6 Bom, 110

[8] Balkishan v Kishan Lal (1889) 11 All, 148 and see Gururajammah v Venkata Krishnama, (1901) 24 Mad, 359

[9] Pa ... the decision of an issue in one ... against cannot operate as ... Abdul Majid v Jew Narain ... Vaithinata, (1906) 29 Mad., 333 and Mariamnissa v Joynab, (1906) 33 Cal, 1101; 10 C W. N, 934, 4 Calc. L. J, 149.

as *res judicata* although not expressly within the terms of this section see p 104 *infra*

Between the same parties under whom they or any of them claim litigating under the same title

A matter transacted between one set of persons ought not to be allowed to adversely affect a third party[1] but it is only just that persons claiming through or under parties to previous proceedings should be bound by the decisions there in so far as they affect the subject matter of their claim[2] The same rule prevails to admit in evidence documents which would be admissible against persons through whom a party derives his title, they cannot be excluded on the ground that they are *res inter alios acta*[3]

So it was laid down in the "Shivaganga case"[4] that a decree against a Hindu Widow, in the absence of fraud or collusion, binds the reversionary heirs, and conve[illegible]
widow[5]

Cases in [illegible]
in second [illegible]
be privies [illegible]

Karnam[1] [illegible]
by a Tru[illegible]
barred[1]

A decision for or against a man in a representative character will not operate as *res judicata* against him when litigating in his own name or in some other and

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[1] *Res inter alios actae alteri nocere non debet*

[2] See Field s Ev 6th Ed 570

[3] Rani Srimati *v* Khagendra nath Singh (P C 1905) 9 Calc, W N, 74

[4] [illegible]

[5] Arunachala *v* Panchanada (1885) 8 Mad, 348

[6] Harinath *v* Mothur Mohan, L R, 23 I A, 183, (1894) 21 Calc, 8

[7] Narayun *v* Pandurang (1881) 5 Bom, 685 distinguished in Ram Narain *v* Lisheshur, (1888) 10 All, 411, but a decree against some reversioners does not necessarily bind them all, Chiddu Singh *v* Durgadei, (1900) 22 All, 382.

[8] Pertabnarain *v* Trilokinath, (1885) 11 Calc, 186, L R 11 I A, 197

[9] Golab Chand *v* [illegible] l to P C, 23 W R, 253 [illegible] N, 178 A decree again[illegible] ub Chand *v* Narain Singh [illegible] Ata, (1896) 10 All, 69, Gopi Nath Chobey *v* Bhagvat, (1884) 10 Calc, 697, Shangara *v* Krishnan (1892) 15 Mad, 267, Ravji *v* Mahadev, (1898) 22 Bom, 672 See also Prosonno Coomar *v* Koylas Chunder (1863 7) B L R, F B, 759 As to the effect of a decree against the Karnava [illegible]

[10] Venkayya *v* Suramma (1889) 12 Mad, 235

[11] Radhabai *v* Anantrav (1885) 9 Bom 198 see also Sreemati Kamini Debi *v.* Ashutosh Mukerji, L R 15 I A 159, (1889) 16 Calc. 103

[12] Madhavan *v* Keshavan, (1888) 11 Mad, 191.

judgment, that decision is Res Judicata between the parties on the question as to the rate of rent[1] but unless that question is clearly in issue the decision will not so operate[2]

Questions of law—In determining whether a matter is *Res Judicata* by reason of a previous judgment, the question is not whether that judgment was right, but whether it did or did not finally decide the matter in issue[3] It is immaterial whether the decision is or is not sound law,[4] or that it has been disapproved in a later case by a higher authority[5] An erroneous decision on a pure question of law in a previous suit may operate as *Res Judicata*[6] But it has been held that when a decree has been set aside on appeal no issue determined by that decree can operate as *Res Judicata* even if the Appellate court disposes of the case on other grounds[7]

A Full Bench of the ... contained in the ... to appeal and ... rule in the case of ... Court held that ... the other appeal[9] ... and although it ... should be

... Behari Bhagat ... Pargun ... a decree for cesses consult ... and Beni Pershad Koeri

[2] In Balaram Mondul v. Kartick Chandra Roy (1900) 4 Calc W N 161, it was held that a decree obtained in a previous suit for rent by an ijaradar does not operate against the tenant as Res Judicata on the question whether the relation of landlord and tenant exists in a subsequent suit for rent brought by the superior landlord The decision in that suit where the rate of rent was not in issue does not operate as Res Judicata in that subsequent suit against the tenant as regards the rate of rent ... following the rule laid down with regard to recurring liabilities ... the previous decision in a suit for rent can not operate as Res Judicata in a subsequent suit where the amount of rent subsequently ... due is in issue Jotindra Mohun Tagore v. Shambhu ... (1900) 4 Cal W N 41 In a previous suit the defendant contended that he was not liable for the entire rent as part of the land was in the plaintiff's possession He failed ...

[3] Parsotam Gir v. Narbada Gir, (1899 P C) 3 Calc W N 517

[4] Phundo v. Jangi Nath (1893) 15 All, 327 dissenting from Parthasaradi v. Chinna (1882) 5 Mad, 304

[5] Gouri Koer v. Audh Koer, (1884) 10 Calc, 1087

[6] Lal Churn Ghose v. Kumal M D Chaudhuri (1897) 1 Calc W N, 687, reviewed on another point (1898) 25 Cal, 571 2 Calc W. N, 297 and see p 104 post

[7] Nilvara v. Nilvara (1882) 6 Bom, 110

[8] Balkishan v. Kishan Lal (1889) 11 All, 148 and see Gururajammah v. Venkata Krishnama (1901) 24 Mad, 340

[9] Ram Lal v. Chhabi Nath (1890) 12 All, 578 But the decision of an issue in one ... against cannot operate as ... Abdul Majid v. Jew Narain ... Vaithinata (1906) 29 Mad., ... 1101, 10 C W. N, 931, 4 Calc L. J, 149

seen a finding between co defendants which is not necessary for the determination of the suit is not res judicata [1] A finding on an issue between the plaintiff and some other parties to the first suit will not bar a suit by the same plaintiff against those defendants who were not concerned in or by that issue [2]

Probate —Section 41 of the Evidence Act sets out concisely and definitely those judgments *in rem* which amount to conclusive proof in any subsequent suit [3] A grant of probate is conclusive proof of the title of the executors and of the genuineness of the will admitted to Probate so long as the grant remains unrevoked ,[4] but the refusal of a grant does not bar a subsequent suit by the applicant to establish his rights under the will [5] Similarly a grant of letters of administration to a defendant in preference to the plaintiff is no bar to a suit by the plaintiff to determine his rights of inheritance [6] A will held not to be a forgery may be impugned in a subsequent suit as invalid [7]

The only judgment that can be put forward in a Court of Probate in support of a plea of *res judicata* is a judgment of a Court of Probate[8] and the proceedings *must* be put in evidence [9]

In a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised — The leading case on this subject is *Mussamat Edun* v *Mussamut Beehun*[10] wherein Sir Barnes Peacock laid down the rule that the two Courts must be

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[1] Bapu *v* Bhasani, (1898) 22 Bom , 245 But co defendants are bound by essential findings as in Venkayya *v* Narasamma, (1888) 11 Mad , 204 See also Madhari *v* Kelu, (1892) 15 Mad , 264 , Gusai *v* Darga (1907) 30 Mad , 447, and Kandiyil *v* Zamorin of Calicut (1906) 29 Mad , 515 As to a person not a necessary party being bound by a decree if he does not apply to be dismissed from the suit, see Collier *v*. Walters, L R , 17 Eq , 252

[2] Mallu Kunwar *v* Imam ud din, (1905) 27 All , 59

[3] See Field's Ev 6th Ed pp 180, 181 and the judgments in Kanhya *v* Radha, (1867) 7 W R , 338, and Jogendro *v* Funindro, (1872) 14 Moo I. A , 367

[4] Komal Lochun *v* Nil Ruttun, (1879) 4 Calc , 360 No conviction for property can be had in a criminal Court so long as the grant remains unrevoked Manjanali *v* Ramdas Shome, (1900) 4 Calc W N , 176 (notes)

[5] Ganesh Jagannath *v* Ram Chandra, (1897) 21 Bom , 563

[6] Jagannath Prasad *v* Ranjit Singh, (1898) 25 Calc , 354 See also Arunmoyi Dasi *v* Mohendra Nath, (1893) 20 Calc , 1888 The legatees under a will may bring a suit to shew that a decree against the executor has been fraudulently obtained; Ahmedbhoy *v* Vulleebhoy, (1882) 6 Bom , 703; Coneha *v* Coneha, 11 App Cas , 541

[7] Thandavan *v* Valliamma, (1892) 15 Mad , 336

[8] Chinnasami *v* Harihavabadra, (1893) 16 Mad , 380

[9] Kurrutulain *v* Nazhal ud dowla, (1906) 33 Calc , 116 , 9 Calc W N , 938 , 7 Bom L. R , 876 and see (1905) 1 Calc L J , 594

[10] [illegible]

in the Moonsiff's Court for possession of a house. C who intervened and was made a defendant claimed the house under a deed of gift of that and other property. The suit was dismissed in the Court of first instance, but decreed in appeal. C then sued A in the Subordinate Judge's Court (the Moonsiff's Court not having jurisdiction) to recover all the property included in the deed of gift; held, that the claim to the house but not to

Courts of concurrent jurisdiction, and that "in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive"

The two Courts must have concurrent jurisdiction as regards the pecuniary limits as well as the subject matter,[1] and the extent of the jurisdiction of course depends on that of the Court in which the first suit was instituted[2] at the time the first suit was brought[3] so that for the purposes of this section a rise in the value of the subject matter after plaint filed need not be considered even though the Court ceased to be the proper Court to try that suit so far as pecuniary jurisdiction was concerned

The plea of *res judicata* should be given effect to if the Court, which passed the decree in the first suit is a Court of jurisdiction competent to try the second suit, irrespective of its inability to entertain it owing to the existence of another Court with preferential jurisdiction [4]

Right of Appeal —Explanation II, newly added to this Code, definitely settles a point on which the High Courts differed[5] under Act XIV of 1882, sect 13, and in determining the question of "competence" it is no longer necessary to consider the right of appeal from the Court in which the "other" suit was tried. In considering the jurisdiction of a Court to entertain any particular suit, the nature of the claim and the matter involved therein are to be looked at: the defence raised is immaterial to such an inquiry [6]

Consent of parties —The consent of litigants cannot give a Court jurisdiction which it does not enjoy,[7] but it seems that a party may in some cases be estopped by his acquiescence in earlier proceedings [8]

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the other property was *res judicata*, Pathumi v Salimamma, (1895) 8 Mad 83, not followed in Shibu Rout v Baban (1908) 12 Calc W N, 359 See also Ramdayal v Jankidas, (1900) 24 Bom, 456 On an application for execution of a decree, the Court is not competent to try finally whether the applicant is the legitimate son of the deceased decree holder, and a decision of the question on such application will not prevent its being raised in a subsequent suit—Abedoonissa v Ameeroonissa, (1877) I R, 4 I A, 75

[1] Misir Ragh [illegible] R, 9 I A, 197, Run [illegible] 3, (1885) 11 Calc, 201, [illegible] Lal v Sarat Chandra, [illegible] 16 All, 183, Girija v Sabapathy, (1906) 29 Mad, 65

[2] Mahomed v Reer Chunder [illegible] (1908) 12 Calc, W N., 359.

[3] Gopi Nath Chobey v Bhagwat, (1884) 10 Calc. 697, Raghunath v. Issur Chunder, (1885) 11 Calc, 153, Kunt Amma v. Raman Menon, (1892) 15 Mad, 494.

[4] Ghulappa v. Ragharen lra, (1904) 28 Bom, 338

[5] Jisullah v Inu Khan, (1896) 23 Calc., 693; Rai Charan v Kumud Mohun, (1898) 25 Calc, 571, 2 Calc, W. N., 297; Raja Simhadri v Ramachandruda, (1904) 27 Mad, 63; over ruled in Aranassi v Nachammul, (1906) 29 Mad, 196; Bholabhai v. Adesang, (1885) 9 Bom, 75

[6] Fields Ev 6 Ed. 570, Chandra Kumar Mandal v. Bakir Ali Khan, (1869) 9 W. R, 598

[7] Govt. of Bombay v. Ranmal Singji, (1869) 6 Bom., H. C. Rep, 242; Queen v. Bholanath Sen, (1877) 2 Calc, 23.

[8] Brohmo Moyee Dassia v. Anand Ch Chatterjee, (1874) 22 W. R, 120; Kandath Mammi v Neelancherayie, (1876) 8 Mad, H. C. Rep 14; and see Fields Ev. 6th Ed., 569, 570

Presumption as to jurisdiction

The rule in England is that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so and nothing is intended to be within the jurisdiction of an inferior Court but that which is expressly alleged

A party, who relies upon the decision of an inferior tribunal must be prepared to show that the proceedings were within its jurisdiction[1] and this rule has been quoted and followed in India[2] The Chartered High Courts and the Chief Courts of the Punjab and British Burma are probably the only Indian Courts, which may be regarded as *superior* Courts in applying this rule[3]

Declaratory Decree—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken what it would be, if the suit were one for possession of the property[4] Where in a suit for enhancement of rent, the plaintiff failed to prove notice of enhancement but the Court enquired into and gave a declaratory decree as to his right to enhance, such decree is decisive of the right in a subsequent suit for enhancement of rent of the same tenure[5] Where a person having previously obtained a decree declaratory of his title sues his co sharer, who is bound by the decree to recover arrears, the previous decree operates as *res judicata* regards the title of the plaintiff[6] The dismissal of a suit for the declaration of plaintiff's right to receive rent from a tenant of a portion of an estate cannot be pleaded as an estoppel in a suit to establish plaintiff's general right as proprietor of the whole estate[7]

Revenue Courts—The finding of a Revenue Court on a matter *exclusively* reserved by the legislature for their decision will operate as *res judicata* in a Civil suit subsequently brought in a Civil Court,[8] but in proceedings of a civil nature such as a suit for a declaration of proprietary right, the decision of a Court of Revenue on a question of title cannot omit the jurisdiction of the

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[1] Peacock v Bell, 1 Saunders Rep 74 Gosset v Howard 10 Ad and E Q B Rep 359 Stanton v Styles 5 Wels Hur and G 578 The jurisdiction of an inferior Court if it do not plainly appear may be inferred by fair and necessary intendment *In re* Commissioners of Calcutta, 1 Boul 565

[2] Queen v Nabadarp Goswami, Peacock C J I B L R D Cr, 30 The Court must be able to judge of this for itself, the judgment in the other suit is not sufficient Mirza Kurratulain v Nuzhat ud dowla, (1905) 9 Calc, W N, 938, and see *supra*

[3] See Fields I v 6th Ld 509

[4] Ganapati v Chathu (1889) 12 Mad, 223 But see Venkataraghava v Rangamma (1892) 15 Mad, 498

[5] Nuffer Chunder Paul v Poulson, (1874) 12 B L R, 53

[6] Dulabh Vahuji v Bansidhar Rai, (1885) 9 Bom, 111

[7] Kishendhun v Bhookto Polly, (1868) 9 W R, 461

[8] Act, VIII
Secry of
Sanonian
2 Calc,
3 and for
ghava v
Amrit v
Radha v
Har Sahai
ll, 200
(1885) 7
achalapati
) 10 All,
(1893) 15
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Civil Courts to decide the same question[1] And this rule applies even where the decision was necessary for the disposal of the proceedings before the Revenue Officer[2]

Dismissal of a suit by Mamlatdar — A possessory suit filed in the Mamlatdar's Court was dismissed by the Mamlatdar on the merits The plaintiff thereupon filed another suit under s 9 of the Specific Relief Act, I of 1877, in a Civil Court which allowed the decree and passed a decree in his favour *Held*, that having regard to sec 18 of the Mamlatdars Courts Act (Bombay Act III of 1876) the Mamlatdar's decision could not operate as *res judicata*[3]

Civil Court's jurisdiction under special Acts — An award as to the apportionment of compensation under Act X of 1870, sec 40 is final and binding on the parties in whose presence it is passed,[4] but a decision under sec 39 of Act X of 1870, is not *res judicata* in respect of the title to portions of the property not taken up under the Act[5] The dismissal of an application under sec 63 of the Administrator General's Act, II of 1874, for an order for the payment of money,[6] and the dismissal of an application under sec 55 of the National Debt Act, 1870 for the transfer of stock[7] will bar a subsequent application Otherwise, where an application for the guardianship of a minor is made under Act XI of 1861[8] the decision would not prevent a regular suit for recovery of possession of the minor[9]

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[1] An order striking off a petition under sec 103 Bengal Tenancy Act does not [illegible]

is merely incidental, and is no bar to fresh suit on title in a Civil Court, Rama v Tirtasami (1884) 7 Mad, 61 Gangaraju v Kondireddiswami (1894) 17 Mad, 106 A zemindar distrained for rent under the Rent Recovery Act 186[illegible] Thereupon, the tenant filed a summary suit under that Act in the Revenue Court and the distraint was annulled on the [illegible] by sec [illegible] recover [illegible] *tah* was [illegible]

[2] Ram Kishori v Raja Ram, *ex pro*

[3] Ram Chandra Lalaji v Narsinhacharya (1900) 24 Bom 251

[4] Nilmonee v Rambundhoo, (1879) 4 Calc, 757

[5] Nobodeep v Brojendro (1881) 7 Calc, 406, Mohadevi v Neelamani (1897) 20 Mad, 269, compare Ram Chunder v Madho (1886) 12 Calc, 484, L R 12 I A 188 where the first decision was passed in the ordinary jurisdiction of a Civil Court

[6] Smith v Secretary of State (1878) 3 Calc, 340

[7] May, in re, 28 C D 516

[8] Nehalo v Nawal (1876) 1 All, 428

[9] Krishna v Reade, (1886) 9 Mad., 31

An entry of a record prepared under sec 108 of the Land Revenue Code (Bom Act V of 1879) by the Survey Officer describing certain lands as *khoti* is by force of sec. 17 of the Khoti Act (Bom Act I of 1880) conclusive and final evidence of the liability thereby established, and shuts out the evidence of a prior decision under sec 40 of the Evidence Act otherwise relevant (as proof of *res judicata*) whereby a Civil Court adjudged the land to be *dhara* [1]

A Collector's decision under Sec 13, Act III of 1895, as to whether lands are the emoluments of an office operates as *res judicata* [2]

Under Act VIII of 1876 (B C) a suit is maintainable in the Civil Court to determine a question of right and title, it is not barred by Sec 149 cl (*d*) of that Act

Special Courts—Where a suit was dismissed in the Agency Court at Vizagapatam and the dismissal upheld by the Governor of Madras in Council on the ground of political expediency the Privy Council held that no such consideration could bar the plaintiff's legal right to have his rights determined by a Civil Court [3]

Small Cause Courts—Are not Courts of exclusive jurisdiction and the consent of parties cannot give them jurisdiction to decide questions relating to immoveable property [4]

Criminal Courts.—No fact found proved in a Criminal Court shall on that account be taken to be proved in a Civil Court [5] The finding of a Criminal Court that A had abducted B is not *res judicata* in an action for damages brought against A by B's father [6] The adjudication by a Magistrate that a street is a highway does not bar a regular suit to declare it is private property,[7] but his decision as to possession under sec 530 of the Code of Criminal Procedure is final [8] When a High Court directs that criminal proceedings be taken against a party to a suit before it for perjury or forgery, the High Court has no power on an appeal being preferred against that decision to direct that such proceedings be stayed until the appeal shall have been heard and determined [9] It is not an invariable rule that criminal proceedings should be stayed during the pendency of civil litigation regarding the same subject matter [10]

Foreign Court—The word "Court" includes a Foreign Court [11]

Heard and decided.—There must have been a decision upon the matter alleged to be *res judicata*;[12] the other suit will not operate as a bar if it was

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[1] Ramchandra v Raghunath, (1896) 20 Bom, 475.

[2] Raghunath v Khajet Mohamed, (1905) 2 Calc, L J, 351. As to an enquiry by a Registrar under Act III of 1877, sect 74 as to genuineness of a document see Mahima Ch Dhar v Jogul K Bhattacharjya (1881) 7 Calc, 736

[3] Maharaja of Jeypore v. Ganupuran Deenabandhu, (1905) 28 Mad, 42.

[4] Denonath Batabyal v Adhor Chunder Sett (1900) 4 Calc W. N, 470; Sriranga Chariar v Ram Sami (1895) 18 Mad, 189; Poran Sookh v. Parbutty, (1878) 3 Calc, 612, Manappa Mudali v McCarthy (1878) 3 Mad, 192; Inaya Khan v Rahmat (1880) 2 All, 97

[5] Bal [illegible] [illegible] v Durga Charan, [illegible] Madhu Kaiburto, [illegible] B L R, A. C, 31; [illegible] W. R., 339; Ganga [illegible] v [illegible], 2 All, H. C, Rep (1870) p 88.

[6] Ram Lal v. Tula Ram, (1882) 4 All, 97.

[7] The Q v Hutchings, 6 Q B. D., 300.

[8] Lilla v. Annaji, (1881) 5 Bom., 387.

[9] Ram Prasad, in the matter of, (1863) B L. R, F. B, 426; Raj Kumari v. Bama Sundari, (1896) 23 Calc, 610; contra, Sri Nama Maharaj, (1892) 16 Bom., 729

[10] Devji, in re, (1894) 18 Bom, 581.

[11] Bababhat v Narharbhat, (1889) 13 Bom., 224

[12] Radhamadhub v. Monohur, L. R, (1888) 15 I. A, 97; 15 Calc, 756; Ananta v. Damodhar, (1889) 13 Bom, 25 A judgment and decree obtained on an

disposed of on some preliminary point Thus where the first suit brought by the assignee of a mortgage, was dismissed for want of notice under section 132 of the Transfer of Property Act the plaintiff gave notice and sued again His claim was held not to be *res judicata* [1] But where the matter has been heard and determined in a suit, a party thereto cannot evade the provisions of this section in another suit for the same relief by the allegation that he was prevented from producing evidence in the first suit [2] Nor can a party question the validity of a decree to set aside which he might have brought a separate suit[3] or of an order dismissing an application from which he might have but did not appeal [4]

And a consent decree[5] is just as binding on the parties thereto as a decree passed after a contentious suit

Where a matter has been heard and determined and a decree obtained by the plaintiff, which owing to his own fault cannot be executed[6] or execution of which is barred by limitation[7] a subsequent suit will not lie

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award have been held to amount to *res judicata*, Vyankatesh v Sakharam, (1897) 21 Bom, 466 See also Wazeer Mahton v Chum Singh, (1881) 7 Calc, 727, and Krishna Panda v Balaram, (1896) 19 Mad 290

[1] Ramireddi v Subarreddi, (1889) 12 Mad, 500, Bitto Kunwar v Kesho P. Misr, (1897) 19 All, 277, L R, 24 I A, 10, 1 Calc W N, 265 Thus, where [illegible] the ground that the [illegible] uit on the title under [illegible] ichment, will not be [illegible] nd see Ibrahambhai v [illegible] none of the parties [illegible] Ram Coomar, (1870) 14 W. R, 81, or where the first suit was dismissed under sec 27 Act VIII (B C) of 1869—Brindabun v Dhununjoy (1880) 5 Calc, 240 [as to the present law see Ramdhun v. Ram Kumar (1890) 17 Calc, 926] or under sec 10 cl 2 of the Court Fees Act—Muhammed v Nabian, (1886) 8 All, 282, or for default in paying fees but not under sec 158—Saheb v Mahomed (1890) 13 Mad 510, or under sec 102—Chand Koer v Partab Singh (1888) L R, 15 I A 156, or under sec 381—Rungrav v Sidhi Mahomed, (1882) 6 Bom, 482, Hariram v Lalbai, (1903) 26 Bom 637 Or non joinder of parties—Pursun v Purnanund, (1874) 21 W R, 272, or for multifariousness—Futteh Singh v Luchmee Kooar, (1870) 21 W R, 105, 13 B L R, App 37, or because the liability for rent was not joint but several—Tilakdhari v Bissendro Mar[illegible] cribed in the [illegible] the first suit c[illegible] L R 24 I A [illegible] collected under Watson v Collector [illegible] any bar when the other suit was dismissed in the defendant's absence, the plaintiff adducing no evidence. See also Hira Lal v Dirya, (1906) 10 Calc, W. N, 209, and id 839

[2] Wats[illegible] Collector of R[illegible] 60; 12 W R., P. C, [illegible] 3, Venkatachalam v. [illegible] v. Sridhar, (1890) 12 [illegible]

[3] Bansi Lal v. Ramji Lal, (1898) 20 All, 370

[4] Nobi Muhammed v Jwala Persad, (1905) 27 All, 148

[5] Nicholas v Asphar, (1897) 24 Calc, 237 [illegible] 2 Calc. W N., 174; Lakshmi Shar[illegible] But an agreement in compromise of a[illegible] suit not will operate as *res judicata*—[illegible] 15. A decree on a compromise desc[illegible] ment debtor on a permanent tenure, a[illegible] barred from maintaining that they [illegible] Jullram, (1905) A. W. N, 128

[6] Hossein Buksh v Musund, (1872) 18 W. R., 260.

[7] Ram Tal v Ram Narain, (1870) 2 All, H. C., 382. Ram Saran v Chatar Singh, (1901) 23 All, 465

held that a compromise and consent decree in a right of way case could not bind the public at large, although by the law of Scotland one person is allowed to represent the public in such an action, and the result of a contested action is binding on the public This decision was followed in *Keshava* v *Rudran*[4] where the first suit was decided on the plaintiff's oath with the defendant's consent The Scotch case has been considered and explained in the English Court of Appeal where a judgment by consent or default has been held to be as effective as an estoppel between the parties as a judgment in a contested case [5]

In Madras it has been still more recently held that as between the parties to a suit a decree arrived at after taking an oath on a question of fact is a final adjudication [6]

The principle of *Res Judicata* has been held to apply to a case in which the plaintiff's first suit was partly gone into and then dismissed for default [7]

Fraud —It was held under Act XIV of 1882 that the corresponding section did not bar a suit to set aside an ex parte decree on the ground of fraud where the plaintiff has not appealed against an order rejecting an application to set it aside [8]

Jurisdiction —Where the first suit has been dismissed on the ground of jurisdiction, the second suit will not be barred,[9] even though the plaintiff might have given the Court jurisdiction by obtaining a certificate under the Pensions Act of 1871[10], or by applying to the High Court,[11] or to the Collector [12]

Nominal Party, no Relief —And where in a suit for redemption it was held ... A ... not a necessary party and under no obligation to make a defence ... owing the property[13] ... against whom no ... defendants, and the

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[1] Modhusudun v Brae (1889) 16 Cal, 300

[2] Baichunder Manickya v Hurrish Ch Das (1878) 3 Calc, 383

[3] Jenkins v Robertson (1866 9) L R, 1 H L, Sc App, 117 See O Kinealy's C P Code 6th Ed 78 and Field's Ev 5th Ed

[4] Keshava v Rudran (1882) 5 Mad 259 For similar decisions see Thenju v Chimnu (1884) 7 Mad 413, Nilmoney Singh v Heera Lall Das, (1881) 7 Calc, 23, Bhaginath v Ram Lochan, (1882) 8 Calc, 275

[5] *In re*, South American and Mexican Co (1895) 1 Ch 37 cited in Nicholas v. Asphar *supra*

[6] Ahmed v Moidin, (1901) 24 Mad, 244

[7] Rama v Mohesh, (1905) 9 Calc W N, 679

[8] Pran Nath v Mohesh Chandra (1897) 24 Calc, 546, followed in Ram Narain Tewari v Sheo Bhunjan (1900) 27 Calc, 197, and Dwarka Prasad v. Lachoman Das (1890) 21 All, 289

[9] Ram Gobind v Mungur, (1883) 13 C L R, 83, Lakshman v Ramchandra, (1881) 5 Bom, 48, Bhukhandas v Lallubhai, (1893) 17 Bom, 562; Baban v Nagu (1888) 2 Bom, 19, Dullabh v Narain, (1887) 4 Bom H. C, A C, 110

[10] Patali v Tulju (1879) 3 Bom, 223

[11] Suba v Rama (1887) 3 Mad, H C 376

[12] Pattarasy v Vithnuls (1873) 5 Mad H C, 419 But see Hari v Ganpatrav (1883) 7 Bom, 272

[13] Puttappa v Timmaji, (1890) 14 Bom, 176

[14] Rahmubhoy v Turner (1890) 14 Bom, 408; (1893) 17 Bom, 341, Balambhat v Narayanbhat (1901) 25 Bom, 74, Ram Das v Vazirsaheb (1901) 25 Bom, 589, Surjoram v Barhandeo (1905) 1 Cal. L J, 387

liability of one only was determined, and a decree given against him, a second suit against the other defendant was held not to be barred [1] Where the name of the intervenor in a suit was ordered to be struck off the record, but by mistake was not, a subsequent suit by the intervenor will not be barred ;[2] nor will a subsequent suit be barred where the decree in the first suit expressly reserves all questions between the intervenor and the plaintiff in the second suit [3]

Review.—The dismissal of an application for review will bar a suit to set aside the decree on the same grounds [4]

has been set aside can operate as
t operates as an estoppel as regards
;h not referred to in it are necessary
to make the appellate decree possible [6]

Questions of Law.—After some conflict of opinion, it has been held that a decision in a p
operate as *res judicata* i
the dictum that a point
p 94 *ante* A point of la
fact that the decision of a competent Court was founded on an erroneous view of the law does not affect its validity as evidence in subsequent proceedings [8]

Interlocutory orders and orders in execution-proceeding—These do not come within the language of the section but in some cases the doctrine of *res judicata* is applied [9] Such orders, are, if not appealed from, binding on the parties to the suit in all subsequent proceedings in that suit, on principles analogous to those of *res judicata* strictly so called Thus the
will bar a suit to set aside a
on declaring (though erroneous)
d by limitation is final, if not
decree in execution proceedings

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[1] Shib Nath v. Nobo Kissen, (1870) 21 W R , 189.

[2] Kalee Coomar v. Pran Kishore, (1872) 18 W. R , 29

[3] Mobaruck v Gobind, (1872) 18 W. R , 61 See also Kanai v. Sashi Bhusan, (1881) 6 Calc , 777 ; Roghoonath v Jaggutbandhu, (1882) 7 Calc , 214 ; Girdhar v Dayabhai, (1884) 8 Bom , 174 ; but see Sukh Lal v Bhikki, (1889) 11 All , 187 As to the effect of a decree against the wrong party, see Webb v. Wrights, 8 App Cas , 318, p 321.

[4] Ram Gopal v Prasanna, (1905) 2 Calc L J , 508 ; 10 Calc W N , 529 , and see Puran v Neodat, (1907) 29 All 212

[5] Nilram v Nilram, (1882) 16 Bom , 110, 112

[6] Narayanan v. Kannamai, (1905) 28 Mad , 338.

[7] Rai Churn v Kumud Mohon, (1897) 1 Calc W. N , 687 ; Bishnu Priya v.
om Parthasaradi v. China
Chaman Lal v Bapubhai,
oint of law can never be
28 Mad , 517 ; Chinnumisa
itra Padmanand v Radhe
... Reyjumai v Das..., (1906) 29 Mad , 226

[8] Phundo v Jangi Nath, (1893) 15 All., 327 see also Gouri Koer v. Audh Koer, (1884) 10 Calc , 1087.

[9] 11 I. A. 17 ; 29 Calc , 707

[10] Nisdar v Raunak, (1907) 29 All , 608 ; (1907) A W. N , 101 ; and see Puran v Sheolat, (1907) A. W. N., 31.

[11] Mungal Pershad Dichit ...
followed in Raja Tha...
Manjunath v. Venkate...
(1891) 13 All , 564 ; She...
followed in Muhammed ...

is binding[1] and cannot be set aside at a later stage of the proceedings,[2] but the effect of the previous order will be confined to the point actually contested[3] There is no *res judicata* if the objection to execution and the application for execution are simply dismissed for default[4] Where an application for execution is allowed to be ... decided, and there is, therefore ... case that a judgment credito... separate suit does not bar ... debtor allows joint decree holders to take out separate execution, he cannot subsequently object that the application was not in accordance with law[7] A legal representative of a deceased judgment debtor who has allowed proceedings to proceed against him for some time, and has paid part of the decretal debt is estopped from pleading that the decree is incapable of execution against him[8] Where an ... alled has not been made, ... subsequent application ... certificate, his successor ... lthough a Judge cannot return an order for discovery made by his predecessor, he can issue new orders according to circumstances.[11]

Explanation I —This explanation was inserted by the Select Committee who considered the final draft Bill and was intended to remove a conflict of authority as to the meaning of the expression "former suit" See note to "In a former suit" p 94 *supra*

Explanation II —See p 98 *ante*

Explanation III —See p 82 *ante*

Explanation IV ...
(sec ...
whe ...
def ...

Romesh Chander, (1883) 9 Calc, 65, but see Bholanath Dass v Prafulla Nath Kundu (1901) 28 Calc, 122, See also Secry of State v Darbijoy L R, 19 I A, 69, (1892) 10 Calc, 312, Hira Lall v Dwija (1905) 10 Calc W N 209

[1] Kali Mundul v ... 6 Calc, 203, ... Venkata Nara... (1883) 22 C D ...

[2] ... Bani Ram v Nanhumal (1885) 7 All, 102, L R, 11 I A, 181

[3] Budan v Ramchandra (1887) 11 Bom 537, Dinkar v Hari, (1890) 14 Bom, 206, and see Deo Kishen v Bansi, (1886) 8 All, 172

[4] Bholanath Das v Prafulla Nath, (1901) 28 Calc, 122

[5] H ... —when an appli... r party appearing ... W N, 80 ... apati, v Vikrama ...

[6] Gouri Sanker v Abhoyeshari, (1898) 25 Calc, 262

[7] Nanda Rai v Raghunandan, (1885) 7 All, 282 See also as to limitation, Lakshmanan v Kuttayan (1901) 24 Mad, 669

[8] Coventry v Tulshi Pershad (1904) 31 Calc, 822

[9] Delhi Bank v Orchard (1878) 3 Calc 47, L R, 4 I A 127, see also Kishore Bun v Dwarka Nath (1894) 21 Calc, 784, L R, 21 I A 89 and see Gour Moni v Jugut Chandra, (1890) 17 Calc, 57, Hurrosoondari v Jugobundhu (1881) 6 Calc, 203

[10] Vithal v Vithojirav (1882) 6 Bom, 586

[11] Prestney v Mayor of Colchester W N, (1883) p 114, and see Birmingham Land Coy v North Western Ry, 34 C D, 261, p 277

[12] Sarkum Abu v Rahaman Buksh, (1897) 24 Calc, 83.

not so pleaded in an earlier rent suit.[1] These decisions were inconsistent with other reported cases in the Allahabad and Calcutta High Courts,[2] and the law on the point remains unsettled. It is suggested that where the subject matters of the two suits are different, this explanation will not apply.[3] The undernoted cases decided under the corresponding section of Act XIV of 1882 may still be of service in interpreting this section.[4]

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[1] Kailash Mundal v. Baroda Sundari, (1897) 24 Calc. 711, 1 Calc., W. N., 563, followed in Woomesh Ch. Maitra v. Baroda Das Maitra (1901) 28 Calc., 17, Nattu v. Budhu (1897) 18 Bom., 537, and see Umesh Ch. Dey, v. Sharbessar (1906) 5 Calc., W. N., 304.

[2] Sri Gopal v. Pirthi Singh, (1902) 24 All. 429, L. R. 29 I. A. 118; 6 Calc., W. N. 889, Gopal Lal v. Benarasi (1904) 31 Calc., 428, Baranashi v. Jaborilal (1904) 8 Calc., W. N., 385.

[3] See Draft Bill of 1903 Clause 11 Expl. III and see Rajendra v. Tarangini (1904) 1 Calc. L. J. 248.

[4] St... ... tgage bond, the mortgagors set up a ... the mortgagees set off as against for rents ... action of rents ... the mortgagees obtained relief ... The mortgagees sold the property ... The mortgagors subsequently got decrees ed with sanction of the Court ... their decree and purchas sale on the ground that they had an equity ... mortgagors then sued to set aside the years 1871 to 1874 and the rents credited ... to have an account taken for the their equity should have been raised in the former suit ... against the debt. It was held that v. Macnaghten (1889) I. R. 16 I. A. 107 16 Calc., 682. See also the remarks of Sir Barnes Peacock in the case of Thakur Shankar v. Dya Shankar (1888) L. R. 15 I. A. 66 ... 70 and Rangayya v. Nanjappa, (1901) 24 Mad., 491.

A redemption decree simply declared the amount of the debt due under the mortgage, but provided no time within which it should be paid or the mortgage foreclosed. Subsequently the mortgagee sued to recover his mortgage debt personally from the mortgagors and to sell the mortgaged property. *Held* that the claim to sell was prohibited by this explanation—(1889) Maloji v. Sagaji 13 Bom., 567, and see Chudasama v. Ishwargar, (1892) 16 Bom., 243. A widow purported to charge land which she held for her widow's estate with payment of a debt; and afterwards surrendered her estate to the next heir or reversioner on condition that he should pay all her debts. A creditor then sued both the widow and the reversioner, the cause of action against the latter being that in his hands was the property chargeable. The suit was dismissed as against him, but decreed against the widow. After the widow's death, the creditor sued the reversioner for the balance of the widow's debt on the ground that he had ... surrender of the estate from her ... that this "might and ought to h... former suit, and must accordingly ... stantially in issue in the former s... Rameswar Prashad v. Ruttagon ... 231. But this only appl. Calc., ... is identical,—Rajen ..., 304 an... sued to recover cert... where it wr... of the former owned Gopa v. S... ... of the widow had previously su... 9 Calc. W. N., 466 see ... as reversioners. They surviving member ... N., 469, Koyyanna v. Dasy ... no land, claiming as the That suit had ... Sigi Nath, (1893) 15 All., 227 see al... the former owner belonged. Tirkappa, (1... Calc., 1057. ... was barred—Gudlappa v. (1901) ... A. 17; 29 Calc., 707 ... Banerji v. Mrinmayi Debi, ... 20 Mad., 643. When

[10] Nadar v. Parr... ... v. Sheolat, (...) 29 ... dismissed ... the ... (1892) ... rty as owner, having no ... was *held* that he could ... possession of the same ... mortgagee might have ... Khan v. ... died, A. ... limit

[11] Mungal Persl... followed in ... Manjunath ... (1891) 13 All. ... followed in 1...

[illegible]

[illegible]

... decree in a redemption suit directed the plaintiffs (mortgagors) to pay to the defendant (mortgagee) Rs. 5,000 and costs and to redeem the mortgaged property. The plaintiffs paid these amounts and obtained possession in March 1894. In the meantime the defendant preferred an appeal and the decree was varied by substituting Rs. 6,000 for Rs. 5,000. The balance of Rs. 1,000 was then paid. Subsequently the legal representatives of the mortgagee brought a suit against the representatives of the mortgagors to recover the profits of the mortgaged property for the period intervening between the date at which they obtained possession and the date at which they paid the full amount ordered by the Appellate Court. *Held*, that the matter was *res judicata* and the suit barred, the question being one arising directly out of the mortgage transaction which was the subject of litigation in the previous suit—Vinayak v. Dattatraya, (1901) 26 Bom.,

[1] Cottingham v. Earl of Shrewsbury, (1843-4) 3 Hare, 627.

[2] West J., in Ramchandra v. Narayan, (1887) 11 Bom., 216; Ahmad Ali v. Najabat Khan (1896) 18 All. [illegible] Calc. W. N., 30, 31 Calc., [illegible]

[3] Bapu v. Bhawani, (1898) 22 [illegible] (1895) 18 Mad., 374; Raj Na[illegible] Muhammat Kuai v. Visvana[illegible]

[4] Chajju v. Umrao Singh, (1900) 22 All., 380; Balambhat v. Narayanbhat, (1900) 25 Bom., 74.

No such adjudication can take place where the plaintiff's suit has wholly failed [1]

There is no *res judicata* in a dispute between parties all of whom claim under the person in whose favour the decision in the previous suit was given [2]

Co-plaintiffs On the 8th February 1889, the defendant sold to the plaintiff under a registered conveyance, land of which he was not in possession, and the purchase money was paid The plaintiff and the defendant sued for possession but failed on the ground that the vendor had no title The plaintiff then sued on the 7th February, 1895, to recover with interest the purchase money and the amount of costs incurred by him in the previous litigation, held, that the defendant was not entitled to give evidence of this alleged title, as that matter was *res judicata* [3]

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661 A suit instituted in 1879 against a minor was compromised by the plaintiff and guardian *ad litem* and a decree for the plaintiff was passed by consent In 1882, the minor sued by his next friend to have the consent decree set aside on the ground that it had been obtained by fraud practised on the guardian *ad litem*. That suit was dismissed In 1884, an application was unsuccessfully made in the original suit objecting that the compromise had been entered into without the sanction of the Court The minor having attained majority now sued to have the consent decree set aside on the ground that it had not been sanctioned by the Court *Held*, (1) that the consent decree had not *ipso facto* sanctioned the compromise, and that the suit was not barred by the order dismissing the application in 1884, (2) that it was barred by the decree in the suit of 1882 as the want of sanction might and ought to have been made ground of attack in that suit—Arunachalam v Meyappa, (1898) 21 Mad, 91, but see Veerana v Muthu Kumara (1904) 27 Mad, 102. Where it was alleged for the appellant before the Privy Council that the Judges of the three Courts below were mistaken in saying that a certain bond had not been set up by him in a previous litigation, whereas in fact it had been so set up and that the decree was wrong in not dealing with it, *held*, that the decree might have been corrected if not in accordance with the judgment or appealed against when both judgment and decree were wrong and their lordships could not go behind such decree when neither of such courses had been adopted—Sri Gopal v Pirthi Singh (1902) 6 Calc W N, 880, L R, 29 I. A, 118.

Suits held not barred A decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree under s 92 of the Transfer of Property Act, but simply dismissing the suit on the ground that the mortgagor had not, prior to its institution, paid or tendered the whole of the mortgage money at a time authorised by the deed did not have the effect

[1] Kevan v Crawford, (1877) 6 C. D pp 41, 42 See, accordingly, Brojo

[2] Asghar Reza v. Mahomed Mehdi Hossein (1902) 7 Calc. W. N, 482.

[3] Krishnan v Kannan, (1898) 21 Mad, 8.

Explanation V—The following decisions under the corresponding explanation No III of Act XIV of 1882, may still be of service

In *Luteefoonissa* v *Luckeemonee*,[1] the first suit was for possession of land and *wasilat* from 1253 the date of plaintiff's dispossession Decree for possession and *wasilat* from the filing of the plaint Second suit for *wasilat* from 1253 to filing of plaint, held barred as *res judicata* A sued for possession of property and his suit was dismissed, though he had proved a title to one third, with leave to bring another suit for the one third It was held that the leave was inoperative and the decision was *res judicata* in regard to the one third [2] A suit for possession and mesne profits up to the date of the suit only was held not to bar a subsequent suit for mesne profits accruing after the date of suit [3] Where a suit has been brought for possession of immoveable property and for mesne profits, both before and after suit, the mere omission of the Court to adjudicate upon the claim for future mesne profits will not by reason of section 13 Expl III (Act XIV of 1882) operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit [4]

A suit was instituted for possession and mesne profits A decree for possession only was given A second suit was instituted for the same mesne profits and for mesne profits for a subsequent period *Held*, that the claim for mesne profits prior to the institution of the fresh suit was barred [5] A sued for future maintenance, but in the decree, founded on a compromise, the date of payment was not given, and it could not be executed It was held a

of foreclosure or of *res judicata*—Dondh Bahadur v Tek Narain (1899) 21 All, 251 Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage deed and this fact was overlooked by the defendant, and when while the judgment declared 'that a decree be given against the hypothecated estate,' in the decree the property affected was described as the property described in the plaint held that the decree must mean the hypothecated property mentioned in the plaint and that s 13 (Act XIV of 1882) did not conclude the defendant from subsequently suing to recover the property wrongly included in the plaint,—Ram Chander v Kondo, (1900) 22 All, 442 In a previous suit the plaintiff claiming as the legal representative of a deceased mortgagor sued

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[1] Luteefoonissa v Luckeemoonee, (1864) Marsh 93

[2] Sukh Lal v Bhikhi (1889) 11 All 187

[3] Mon Mohan v Secretary of State (1890) 17 Calc 968 followed Hays v Padmanand (1905) 32 Calc 118 and see Ramabhadra v Jagannatha (1891) 14 Mad 328, and Bhivrav v Sitaram (1895) 19 Bom 532

[4] Ram Dayal v Madan Mohan (1899) 21 All 425

[5] Jiban Das v Durga Persad (1894) 21 Calc 252; Kachu v Lakshman Singh, (1901) 25 Bom 115

second suit would not lie [1] A sued to sell certain property in execution of a decree He withdrew the suit without obtaining leave to bring another suit. He sued again to sell the same property in execution of another decree, *held*, that the second suit was not barred, Expl III applying only to a decree which does not expressly grant the relief applied for [2] Certain partners who had been parties in a previous partnership suit sued on the allegation that the partnership account had been adjusted by an Amin in the previous partnership suit, and that the debts and dues of all parties had been adjusted therein They therefore prayed for the recovery of the amount due to them under the Amin's adjustment, *held*, that the suit was not barred under either Expl II or Expl III to section 13 Act XIV of 1882 [3] A decree awarded a plaintiff possession of land together with mesne profits Plaintiff subsequently applied in execution for delivery of the land and for mesne profits The Court directed plaintiff to be put in possession of the land, but passed no order with regard to mesne profits Plaintiff subsequently made another application for mesne profits, *held* that the application was not barred [4]

issue is no more a bar to a future suit than it would be, if that judgment were reversed by the Court of Appeal

Where the first suit A v B for damages for cutting down trees was dismissed ...) B did not cut down the ... round that he had failed ... bsequent suit A v B for ... barred as *res judicata* [5]

Explanation VI—The insertion of the words public right seems to secure the application of this explanation to suits which may be brought under section 91 for relief in cases of public nuisances This addition in conjunction with section 91 renders it possible for a decree to be obtained apparently binding upon all persons interested as members of the public and in the event of a consent decree being obtained in such a suit, the Court in India will no doubt reconsider the House of Lords case of *Jenkins v Robertson* [6] and decide whether such a decree arrived at without judicial consideration, can bind the general public

Private right claimed in common—In suits of this kind leave must be obtained from the Court under O I r 8, so there is a simple test by which to ascertain whether any particular case comes within this explanation [7] The explanation applies to an easement or other right claimed by a number of persons under a common title or custom, but not to a prescriptive right claimed by

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[1] Venkanna v Aitamma, (1889) 12 Mad 183 See Den bundhoo v Kristo monee, (1877) 2 Calc 152, Becharji v Pujaji, (1890) 14 Bom 31 See in connection with this last case, Latmabai v Aishabai (1889) 13 Bom 242

[2] Kamini Kant v Ram Nath, (1894) 21 Calc 265

[3] Dhaniram Saha v Bhagirath Saha, (1895) 22 Calc, 692

[4] Nityananda v Gajapati Vasudeva (1901) 24 Mad, 681,

[5] Nilvaru v Nilvaru (1882) 6 Bom 110 and see Balkishan v Kishan Lal (1889) 11 All, 148 For similar decisions see Gungabishen v Roghoonath (1881) 7 Calc, 381; Emamooddeen v Futteh Ali (1879) 3 C L R, 447, Chunder Coomar v Shibo Sundari (1882) 11 C L R, 22 Ghurphakri v Purmeshar (1907) 5 Calc L, J, 653, see also the cases referred to under Watson v Collector of Rajshahye (1869) 13 Moo I A 160, 12 W R, P C 43

[6] Jenkins v Robertson L, R, I, H, L, Sc 117 see note to "Consent Decree *supra* p 102

[7] Kalishunkar v Gopal Chunder (1881) 6 Calc, 49, Thanakoti v Munappa (188) 8 Mad, 496, see O Kinealy's C P Code 6th Ed p 85 See notes to O II r 8 and for instances of such suits in England, Cockburn v Thompson, 16 Vesey 321

an individual in respect of his own house and premises [1] It has [illegible] to apply to a suit for a water-course,[2] or to a decree a[illegible] co sharers in a property [3] It was applied in *Madhavan* v *Keshavan*[4] [illegible] successive suits were brought by different trustees of certain trust [illegible]

12 Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he [illegible] not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

Bar to further suit.

This section seems to have been inserted to give effect to order II [illegible] which reproduces the provisions of sects 42 to 45 of Act XIV of 1882, [illegible] ing it imperative for a plaintiff to include in his suit the whole of his [illegible] prohibiting the joinder of certain causes of action without the leave of the [illegible] first had and obtained. These provisions having been relegated to the [illegible] to this Act, this substantive and definite enactment has been considered [illegible] to secure their proper enforcement, in addition to section 121 post [illegible] definition of '*Rules*" Page 30 Ante

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

When foreign judgment not conclusive

(*a*) where it has not been pronounced by a Court of competent jurisdiction;

(*b*) where it has not been given on the merits of the case;

(*c*) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;

(*d*) where the proceedings in which the judgment was obtained are opposed to natural justice;

(*e*) where it has been obtained by fraud;

(*f*) where it sustains a claim founded on a breach of any law in force in British India.

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[1] Field's Ev. 6th Ed 577.

[2] Kalishunkur v Gopal Chunder (1881) 6 Calc, 49

[3] Hazir v. Sonamonee (1881) 6 Calc, 31. But see Chandu v Kunhamed (1891) 14 Mad. 334; overruled in Somasundura v. Kulandaivela (1905) 28 Mad., 457 and Latchanna v Saravayya (1895) 18 Mad 164.

[4] Madhavan v Keshavan, (1888) 11 [illegible]

Act XIV of 1882, sect 14 This section embodies the English law[1] and the old section has been altered and added to by the compilers of this Code

A "foreign judgment" and a "foreign Court" are defined in clause 2 p 11 *ante*

This section definitely enacts that a foreign judgment *shall be conclusive* except in the instances mentioned

Competent jurisdiction —Clause 14 post provides that the competency of the foreign tribunal shall be *presumed* upon the production of a certified copy In several Madras cases, it has been held that where the defendants had taken the chance of a judgment in their favour in the Foreign Court, they were estopped from afterwards pleading want of jurisdiction,[2] but these decisions must no doubt be regarded in the light of the peculiar circumstances in respect of which they were given, and not as conflicting with the general rule that consent of parties cannot give a Court jurisdiction which it does not in fact enjoy A judgment by consent in the Baroda Court has been held to be no bar to a suit in the Bombay Civil Courts on the ground that the foreign Court was not of competent jurisdiction [3]

Not given on the merits —In England, when a suit is based on the judgment of a foreign Court of competent jurisdiction which was not obtained by fraud, such judgment must be presumed to be right and the same result is achieved in British India by this section No irregularity can be objected to so long as the proceedings do not offend against English views of substantial justice [4]

Under Act XIV of 1882, sect, 14 a discretion was given to Courts in India to inquire into the merits of judgments of certain Asiatic and African Courts, but that provision has been omitted from this Code [5] Proviso (b) does not sanction a re opening of the enquiry before the foreign Court nor can a judgment be impeached on grounds which could have been but were not taken in the foreign Court [6]

But if the cause of action did not arise nor the defendant reside within the local limits of the jurisdiction of the foreign Court when the suit was brought the judgment will be no bar [7] A judgment passed against a British subject *in absentem* by a foreign Court to which he has not submitted himself will not support a suit [8]

The following decisions under Act XIV of 1882 may be worth noting —

The decree of a foreign Court cannot directly affect land situated in British

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[1] See Story's Conflict of laws, Westlake's Private International Law and notes to the Duchess of Kingston's case in 2 Smith's Leading Cases

[2] Kanloth v Nilancherayil, (1874) 8 Mad, H C 14, Nallathambi v [illegible] Moidin Sahib, (1879) 2 Mad, [illegible] Mad 106 Sama Rajar, v [illegible] (1892) 15 Mad, 82, but see [illegible] where the defendant in the Foreign Court had protested against the jurisdiction

[3] Lakshmishankar v Vishuram, (1900) 24 Bom, 77.

[4] Pemberton v Hughes (1899) 1 Ch 781 See Westlake op cit Chap XVI sect 327a

[5] Collector of Moradabad v Harbun Singh (1899) 21 All, 17

[6] Gulam K Natla v Marn lugula (1907) 30 Mad, 292.

[7] Hinde v Ponnath, (1879) 4 Mad, 359; Nalla Karuppa v Mahomed Iburan, (1897) 20 Mad, 112, Mathappa v. Chellapa, (1876) 1 Mad, 196 See Westlake's International Law sects 321, 322 and 2 Smith's L C notes to Duchess of Kingston's case

[8] Sivaram Chetti v Iburam Sahib (1895) 18 Mad, 327; and Christian v. Delanney (1899) 26 Calc, 931, 3 Calc W. N, 614.

India.[1] An Act of State by a foreign power is not analogous to a foreign judgment [2]

The mere fact that a suit is pending in a foreign Court at the time the suit is instituted in this country is no bar [3] A foreign judgment on matters in form only will not bar a suit in this country on the merits [4] In a suit on a foreign judgment the plaintiff cannot recover more than appears on the face of the judgment and when such judgment is silent as to interest he cannot make the defendant liable for interest on the amount of the English judgment [5] When a foreign judgment on which the action purports to be brought is not a judgment for an ascertained sum of money, it cannot constitute a foundation for an action [6] The judgment of a foreign Court obtained on a decree in British India is no bar to execution of the original decree [7]

An order under s 12 of the Arbitration Act, (52 and 53 Vict, c 49) enforcing an award made in England is not such a judgment that a suit in a Court in this country can be instituted on it as on a foreign judgment [8]

The Courts in India treat a call order made by the Court of Chancery in England upon a contributory of a Company registered in England, and being wound up under the Court of Chancery, as a foreign judgment and will not allow the liability of a defendant sued upon such order to be disputed, unless it be shown that the Court had no jurisdiction to make the order or that the defendant had no notice of it or that it is not in its nature a final order [9]

For the effect of contracts for the compounding of criminal offences against the law of foreign country, see *Subraya Pillai* v *Subraya* [10] As to irregularity in procedure or limitation in a foreign country, see *Nallatambi Mudaliar* v. *Pillai* [11]

Limitation —For the limitation of suits brought upon foreign judgments see art 117 Sch II Act XV of 1877, *Hira Moni* v *Promotho Nath*,[12] and *Boloram Gooy* v *Kameenee Dassee* [13]

14 The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction

Presumption as to foreign judgments

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1 Palani v Subramanyan, (1896) 19 Mad, 257.

2 Govardhanlalji v Girdharalji (1893) 17 Bom, 620 As to the effect of an adjudication of Insolvency in French territory, see Murugesa v Annamalai, (1900) 23 Mad, 458

3 Delta, I P D, 393, Seal v Chatterjee, (1847 8) 1 Taylor, 418

4 Delta, I P D 393

5 Syed Moazzim v Robinson, (1901) 28 Calc, 641, 5 Calc W N, 741.

6 Smith v Coecho, (1899) 22 Mad, 382

7 Fakeeruddeen Mahomed v Official Trustee, (1881) 7 Calc, 82

8 Deep Narain Singh v Dietert, (1904) 31 Calc, 274, 8 Calc W N, 207.

9 London, Bombay and Mediterranean Bank v Hormasji, (1871) 8 Bom H C Rep, 200

10 Subraya Pillai v Subraya (1868 9) 4 Mad H C Rep, 14

11 Nallatambi Mudaliar v Pillai (1878) 2 Mad, 400

12 Hira Moni v Promotho Nath, (1867) 8 W R 32

13 Boloram Gooy v Kameenee Dassee (1865) 4 W R, 108

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[8] Sivaram Chetti v Iburam Sahib (1895) 18 Mad, 327; and Christian v. Delanney (1899) 26 Calc, 931; 3 Calc. W. N, 614.

simply to give jurisdiction[1] or sums which he did not claim in the suit[2] But the mere fact that a suit has been over valued does not deprive the Court in which the suit is brought of jurisdiction if the over valuation was *bona fide* and had not the effect of altering the appellate jurisdiction,[3] or of prejudicially affecting the disposal of the suit upon the merits[4]

It is the money value of the original suit that fixes the jurisdiction of the Courts throughout the *subsequent litigation in its several stages, not the value of* what has been left in dispute[5] nor is the jurisdiction lost in execution, because the interest accrued after decree has raised the amount due above the money limit[6] A Munsiff has jurisdiction in a suit for money not exceeding Rs 1,000 charged on land although the value of the land is greater, such land lying within the local limits of his jurisdiction[7] In a suit for a declaration of title to four paid offices in a temple, it appeared that the united value of the four offices exceeded the jurisdiction of the Munsiff It was held that the Munsiff had no jurisdiction to entertain the suit[8] The valuation of the suit in the plaint should not be allowed to be increased[9] If the plaint is amended so as to increase the original value, jurisdiction may be destroyed[10]

District Court—Competent to try—All suits for infringement of copyright brought in the mofussil must be laid in the District Judge's Court,[11] and so must in Madras a suit to dismiss a zemindari karnam,[12] in Bombay, suits against a municipality[13] or against Government or any officer in his official capacity,[14] must be brought in the District Judge's Court

Territorial Jurisdiction—Under Act VI of 1871, a District Judge could assign local limits to the jurisdiction of subordinate officers and beyond that the officers had ordinarily no jurisdiction[15] So a court had no jurisdiction, in execution of a decree, to sell property over which it had no territorial jurisdiction at the time it passed the order of sale[16] For the purpose of jurisdiction, a

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[1] Banomali Nawn v Campbell, (1873) 19 W R, 20, but see Damodhar v Trimbak (1870) 10 Bom, 370, Lakshman Bhatkar v Babaji, (1884) 8 Bom, 31

[2] Moot oo v Verapah Chetty (1872) 17 W R, 243

[3] Rajendro Lall v Shama Churn (1880) 5 Calc, 188, Kondaji v Anau, (1883) 7 Bom 448

[4] Hamidannissa v Gopal Chandra (1897) 24 Calc, 661.

[5] [illegible] Boidya Muthu Singh, [illegible]

[6] Shamrav v Niloji (1886) 10 Bom, 200 See also Gopinath Chobey v Bhugwat Pershad (1884) 10 Calc, 697 at p 707

[7] Ja [illegible] Rama Kurup, (1887) 10 Mad, 152

[8] Shamrav v Subba (1887) 10 Mad, 371

[9] Arogya Udayan v Appachi Powthan, (1902) 25 Mad, 543

[10] Chandu v Kombi, (1886) 9 Mad, 208

[11] Hamidoolah v Mahomed (1881) 6 Calc, 499, 7 C L R, 471, Ledgard v Bull (1886) L R, 13 I A, 134 9 All, 191

[12] Venkatanarasimha v Suryanarayana, (1889) 12 Mad, 188

[13] Ahmedabad Municipality v Jamal (1879) 3 Bom, 146, and see Musamiya v Gulam, (1883) 7 Bom, 100

[14] Gopi v Sheso, (1888) 12 Bom, 358

[15] Obhoy Churn Coondoo v Golam Ali (1881) 7 Calc, 410 This is not the effect of s 13, Act XII of 1887—Dakhina Churn v. Bilash Chunder, (1891) 18 Calc 576

[16] Premchand v. Mokhoda, (1890) 17 Calc, 699

claim under O XXI r 99 is a fresh suit, so that where by reason of a change in the law as to the mode of valuing suits *for the purpose of jurisdiction* between the date of the original suit and the claim the Court that dealt with the original suit ceases to have jurisdiction over the subject matter of the claim that Court cannot try the claim [1]

Valuation of suits—By chapter 3 Act XII of 1887, the ordinary jurisdiction of Judges and Subordinate Judges extends subject to the present section, to *all* original suits, that of Munsifs to all such suits in which the subject matter in dispute does not exceed one thousand rupees and an appeal lies to the District Judge where the amount or value of the subject matter in dispute (in the original suit) does not exceed Rs 5 000 The valuation of a suit for the purposes of stamp duty and the valuation of the subject matter of the suit for the purpose of determining the jurisdiction of the Court may be different Thus, an appeal to a District Judge against a decree in a suit for property of the value of more than Rs 5 000 will be set aside on special appeal though the valuation for the purpose of stamp duty may have been less than Rs 5 000 and though the first appeal may have been heard by consent of the parties [3] But now s 8, Act VII of 1887 (the Suits Valuation Act) provides the where in suits other than those referred to in the Court Fees Act 1870 s 7, paras v, vi, and ix and para x cl (d) (*i e* suits for possession of lands and houses, for pre emption to redeem or foreclose a mortgage, and for specific performance of an award) *ad valorem* Court fees are payable the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same It has been ruled that this section applies to Appellate Courts as well as to Courts of First Instance so where in a suit of the description mentioned in s 8 Act VII of 1887 the plaintiff valued his claim at Rs 664 for the computation of Court fees and at Rs 14 000 for the purposes of jurisdiction *held* that the appeal from the decree of the Court of first instance lay to the District Court and not to the High Court [4]

Questions of jurisdiction whether with reference to the nature of the suit or the pecuniary limits of the claim are matters to be governed by the statements contained in the plaint The valuation of the claim as preferred by the plaintiff and not as set up by the plea in defence would govern the action not only for the purposes of the original Court but also for the purposes of appeal and throughout the litigation [5] But when the plaintiff fixes a certain sum as the amount of his claim only approximately or tentatively and prays that the amount of his claim may be ascertained in the course of the suit the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the *forum* of appeal [6]

Accounts—The plaintiff in a suit for accounts must state the amount at which he values the relief sought, but he is free to fix it as he thinks proper [7] When therefore, the approximate amount of the claim was stated in the plaint to be Rs 510, that must be taken to be the value of the subject matter of the suit for purposes of jurisdiction [8] and valuation of a suit for an account should not be

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[1] *Mutammal v Chinnana* (1882) 4 Mad , 220

[2] Compare Nogendro Chundro Mittro v Kishen Soondary, (1873) 19 W. R , 133, 137 8

[3] Aukhil Chunder v Mohini Mohun, (1879) 4 C L R , 491

[4] Varunda Lakshmi v Manegavri (1894) 18 Bom 207 See Bhagvantrai v Mehta Bajurao (1894) 18 *Bom* , 40, *Gulab Singhji v Lakshman Singhji*, (1894) 18 Bom , 100

[5] Jaglal v Har Narayan Singh (1888) 10 All [illegible] See [illegible] Chunder Koomar v [illegible] hto (1876) 25 W R , [illegible] 3 All , 320 See also [illegible]

[6] Gulab Khan v Abdul Wahab, (1904) 31 Calc , 335, 8 Calc W N , 233

[7] Govandas v Dayabhai, (1885) 9 Bom , 22

[8] Khushal Chand v Nagindas, (1883) 12 Bom , 675,

allowed to be increased so as to oust the jurisdiction of the Court[1] According to s 8 of the Suits Valuation Act (VII of 1887) in suits for taking an account the Court fee stamp and jurisdiction are both determined by the amount of claim as fixed by the plaintiff

Adoption suit—The value for the purposes of jurisdiction of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his plaint by the plaintiff[3] For the purpose of determining the jurisdiction over a suit by a reversioner to set aside an adoption, the loss which would accrue to the adopted son, should the adoption be declared invalid, is the measure of the value of the subject matter of the suit[4]

Administration suit—The plaintiff filed an administration suit in the Court of a Subordinate Judge of the Second Class, valuing the relief claimed at Rs 130 The Subordinate Judge found that the property in suit was worth over a lakh of rupees, that the liabilities came to Rs 5 729 and that the defendant was indebted to the estate in the sum of Rs 15 199 He drew up a preliminary decree directing *inter alia*, that the defendant should pay this amount into Court within two weeks. Against this order the defendant appealed to the District Court The District Judge returned the appeal for presentation to the High Court, on the ground that the subject matter exceeded Rs 5 000 *Held*, reversing the order of the District Judge, that the appeal lay to the District Judge[5]

Alienations—When reversioners sued to have declared invalid as against them alienations by a Hindu widow, a Court fee of Rs 10 must be paid in respect of each of the alienations[6]

Alternative Relief—The larger of the two reliefs determines the stamp[7]

Declaratory decree—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared[8] In such a suit, with a prayer for consequential relief the valuation of the relief sought rests with the plaintiff, and not with the Court[9] But if on appeal the plaintiff only appeals against that part of the decree in which the prayer for a declaratory decree is refused he is not liable to pay more than Rs 10 as *ad valorem* fee on the memorandum of appeal under art 17, cl (3), of the Court Fees Act[10]

Ejectment of tenant—A suit to eject a tenant at fixed rates is a suit for the possession of land and the valuation of such a suit for the purpose of Court fees and of jurisdiction is the value of the subject matter of the suit, that is to say, of the tenant right, not of the land itself nor of merely one year's rent[11]

To set aside an instrument—See *Kanaran v Komappan*[12] The valuation in such a suit is the value of plaintiff's interest in the document sought to be

[1] Arogya Udayan v Appachi Rowthan, (1902) 25 Mad, 543

[2] Bai Ambu v Pranjivan Das, (1895) 19 Bom 198 See also Bhagvantrai v Mehta Baju Rao (1894) 18 Bom, 40, and Gulab Khan v Abdul Khan, (1904) 31 Calc, 365 8 Calc W N, 233

[3] Sheo Deni v Tulshi Ram, (1893) 15 All, 378

[4] Keshava v Lakshminarayana, (1883) 6 Mad, 192

[5] Shet Kavasji v Dinshaji, (1898) 22 Bom., 963

[6] Dayachilaya v Ponnathal (1895) 18 Mad, 459 See, too, Moti Singh v Kaunsilla, (1894) 16 All, 308, p 311

[7] Kashinath v Gobinda, (1891) 15 Bom, 82

[8] Ganpati v Chathu, (1889) 12 Mad, 223

[9] Sardar Singji v Ganpat Singji, (1893) 17 Bom, 56, Gulab Singhji v. Lakshman Singji, (1894) 18 Bom, 100

[10] Girijanand v Sailajanund (1896) 23 Calc, 645

[11] Ramraj v Girnandan, (1893) 15 All, 63

[12] Kanaran v Komappan, (1891) 14 Mad, 169

claim under O XXI r 99 is a fresh suit so that where by reason of a change in the law as to the mode of valuing suits for the purpose of jurisdiction between the date of the original suit and the claim the Court that dealt with the original suit ceases to have jurisdiction over the subject matter of the claim that Court cannot try the claim [1]

Valuation of suits —By chapter 3 Act VII of 1887 the ordinary jurisdiction of Judges and Subordinate Judges extends subject to the present section, to *all* original suits, that of Munsifs to all such suits in which the subject matter in dispute does not exceed one thousand rupees and an appeal lies to the District Judge where the amount or value of the subject matter in dispute (in the original suit) does not exceed Rs 5000 The valuation of a suit for the purposes of stamp duty and the valuation of the subject matter of the suit for the purpose of determining the jurisdiction of the Court may be different Thus, an appeal to a District Judge against a decree in a suit for property of the value of more than Rs 5000 will be set aside in special appeal though the valuation for the purpose of stamp duty may have been less than Rs 5000 and though the first appeal may have been heard by consent of the parties [3] But now s 8, Act VII of 1887 (the Suits Valuation Act) provides that where in suits other than those referred to in the Court Fees Act 1870, s 7, paras v, vi, and ix and para x cl (d) (*i e* suits for possession of lands and houses, for pre emption to redeem or foreclose a mortgage, and for specific performance of an award) *ad valorem* Court fees are payable the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same It has been ruled that this section applies to Appellate Courts as well as to Courts of First Instance so where in a suit of the description mentioned in s 8 Act VII of 1887 the plaintiff valued his claim at Rs 664 for the computation of Court fees and at Rs 14000 for the purposes of jurisdiction *held* that the appeal from the decree of the Court of first instance lay to the District Court and not to the High court [4]

Questions of jurisdiction whether with reference to the nature of the suit or ... tements ... plaintiff ... *for the* purposes of the original Court but also for the purposes of appeal and throughout the litigation [5] But when the plaintiff fixes a certain sum as the amount of his claim only approximately or tentatively and prays that the amount of his claim may be ascertained in the course of the suit the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the *forum* of appeal [6]

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[1] Muhammad v Chinnama, (1883) 4 Mad, 279

[2] Compare Nogendro Chundro Mittro v Kishen Soondary, (1873) 19 W R, 133 137 8

[3] Aukhil Chunder v Mohini Mohun (1879) 4 C L R, 491

[4] Varunda Lakshmi v Manegavri (1894) 18 Bom, 207 See Bhagvantrai v Mehta Bajurao, (1894) 18 Bom, 40, Golab Singhji v Lakshman Singhji, (1894) 18 Bom, 100

[5] Jaglal ... omar v ... Bu ... W R, 23 ... See also ...

[6] Gulab Khan v Abdul Wahab, (1904) 31 Calc, 365, 8 Calc W N, 233

[7] Govandas v Dayabhai, (1885) 9 Bom, 22

[8] Khushal Chand v Nagindas, (1888) 12 Bom, 675,

virtually a suit for money and should be valued not at the principal debt but at the entire amount including interest [1]

Trust Property —The valuation in a suit for the removal of the defendant from the management of certain trust funds, is the plaintiff's interest in the subject matter of the suit and the plaint should bear a stamp of a value proportionate to the subject matter of the suit [2]

Additional Court fees —It is competent to a Court which has made an order under s 10 cl ii Act VII of 1870 for the payment of an additional Court fee to enlarge, either before or after its expiration, the time limited for payment of such additional fee [3] See notes to ss 53 54

Appeal —An appeal lies against a decision as to the class to which a suit belongs, although it does not lie against a decision as to the valuation of the suit in that class A decision of the lower Court holding that a suit is one for specific performance of a contract for sale and to be valued according to the amount of the consideration money is appealable [4]

No value —Where the subject matter of the suit has no money value, as in a suit for possession of a minor son the amount of the stamp fee should be computed according to the amount at which the relief sought is stated in the plaint [5] but jurisdiction may not depend on that alone, and if the management of property is involved its value decides jurisdiction [6] A suit for the removal of a karnavan,[7] or for restitution of conjugal rights,[8] is incapable of valuation

Shall be instituted —This section refers to procedure only, and regulates the practice of the Courts, but does not deprive any Court of jurisdiction which it may otherwise possess Thus where a Subordinate Judge entertained a suit contrary to this section, the High Court held that it was a mere irregularity which did not prejudice the appellant, and refused to enter on the question of valuation with a view to determine in what Court the suit should have been brought [9] So where the first Appellate Court dismissed a suit on the ground that the subject matter of the suit being less than a thousand rupees the suit should have been brought in the Munsif's Court and that the Subordinate Judge had acted without jurisdiction in trying it the High Court decided that under Act VI of 1871 s 19 the Subordinate Judge was empowered to try *causes of any value*, and although he should if he had found the value of the subject of the suit to be under a thousand rupees have sent it to the Munsif, still the fact that he tried it himself was no ground of error in special appeal [10] So it has been held the fact of a suit decreed by a Subordinate Judge for less than a thousand Rupees being cognizable by a Munsif's Court is no ground for dismissing it, but the

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1 Kasbinath v Ganpatrao (1894) 18 Bom 696

2 De ... Mirza v Jones, 16 But see ... en held that ... such a suit

3 Chunni Lal v Ajudhia Persad, (1897) 19 All, 240

4 Dada v Nagesh, (1899) 23 Bom, 486

5 Krishna v Reade, (1886) 9 Mad 31

6 Krishna v Raman (1888) 11 Mad., 266

7 Nambiar v Nambiar, (1882) 4 Mad, 146 Narangoli v Naranjoli, (1882) 4 Mad, 314 Kunhan v Sankara (1891) 14 Mad, 78, Krishna v Raman, (1888) 11 Mad, 266

8 Golam Rahman v Fatima (1887) 13 Calc 232, Mowla Newaz v Sajidunnissa (1891) 18 Calc, 378, see also Mulla Adjim, (1887) 14 Calc, 351 See s 9 Act VII of 1887

9 Matra Mandal v Hari Mohun (1890) 17 Calc, 155, Krishnasami v Kanakasabai, (1891) 14 Mad, 183

10 Sufeeoollah Sircar v Begum Bibee, (1876) 25 W R., 219

plaintiff should not be allowed more costs than if he had sued in the lower Court [1] In a suit upon a mortgage in which the amount claimed was in excess of the pecuniary limits of the jurisdiction of a District Munsif and which was filed in the Court of a Subordinate Judge, it appeared that there had been an adjudication by a District Munsif in a previous suit affecting the rights of the parties now in issue and that the present claim was largely composed of interest The Subordinate Judge, having framed issues relating to the claim for interest and having tried them as preliminary issues decided that the suit was within the pecuniary limits of a District Munsif and that the claim had been exaggerated with a view to filing the suit in a superior Court and so avoiding the plea of *res judicata* and he thereupon returned the plaint to be presented to the proper Court *Held*, the procedure was wrong and that the whole suit should have been tried [2] The pecuniary jurisdiction of a Civil Court on its original or appellate side is ordinarily speaking governed by the value stated by the plaintiff in his plaint and if a suit having regard to the valuation in the plaint is within the jurisdiction, such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding its jurisdiction should be given to the plaintiff There is nothing in Act XII of 1887 to confine the sum for which a Civil Court may pass a decree to the limit of its jurisdiction to entertain a suit [3]

Subordinate Judge—As to the case of a Subordinate Judge appointed in Bombay under ss 23 and 24 Act XIV of 1869 see *Shri Sidheshwar* v *Harihar* [4] A Joint Subordinate Judge of the Second Class has jurisdiction to try a suit under s 4 of the Dekhan Agriculturists Relief Act (XVII of 1879), when the suit has been instituted in the Court of the Subordinate Judge of the First Class [5] Where a Subordinate Judge had tried a suit which a Munsiff might have tried it was held he had not acted without jurisdiction [6]

Under value —But if a suit was under valued and taken into the wrong Court, it was otherwise [7] unless the objector was equitably estopped or had delayed in raising the objection Plaintiff applied before a Subordinate Judge to sue *in forma pauperis* and was met by the plea of over valuation and the Subordinate Judge holding that the suit was over valued declined to entertain it Subsequently he obtained a decree before the Munsiff and defendant appealing raised the objection of valuation, and the suit was dismissed as beyond the Munsiff's competency to try *Held* this decision was wrong that the defendant could not turn round and object to the jurisdiction of the Munsif since it was on his opposition that the original application had been rejected [8] Plaintiff's suit was dismissed by a Munsiff as above his jurisdiction He appealed The Court of Appeal, reversing the Munsiff's decision, directed him to try the suit he did so and dismissed it but on appeal plaintiff obtained a decree In special appeal defendant again raised the question but it was ruled that he was not entitled to do so The Court held "the objection as to jurisdiction cannot be taken at this stage of the case the appellant had a right to come up here in special appeal from the order passed on the 14th of June, 1873 This question

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[1] Joy Kishen v Turnbull (1875) 24 W R, 137 and see Mashoolah Khan v [illegible]

[3] [illegible] Act VII of 1887

[4] Koti v Manjaya, (1898) 21 Mad, 271

[5] Madho Das v Ramji Patak, (1894) 16 All, 286

[4] Shri Shidheswar v Harihar, (1888) 12 Bom, 155

[5] Manaji v Narayan Rao, (1895) 19 Bom, 46

[6] Nidhilal v Mazhar Husain, (1885) 7 All, 230

[7] Russick Chunder v Ram Lall, (1874) 22 W R, 301

[8] Brohmo Moyee v Anund Chunder (1874) 22 W R, 120, but see Aukhil Chunder v Moheenee Mohun, (1879) 4 C L R, 491, Shri Sidheshwar v Harihar, (1888) 12 Bom, 155

of jurisdiction has no bearing upon the merits, and simply refers to the form in which a suit should be brought'[1]

Costs—When a suit is dismissed, or the plaint returned, for want of jurisdiction, the defendant is entitled to his costs[2]

Small Cause Court—*Munsiff's Court*—When a Munsiff was vested with powers up to fifty rupees under Act VI of 1871, and there was a Court of Small Causes, under Act XI of 1865, with jurisdiction extending to five hundred rupees, at the same place, a suit of the nature cognizable by Small Cause Courts, if not above fifty rupees in value, must have been brought in the Munsiff's Court[3] So, where two Courts with different money limits possess jurisdiction to try the cause, it should be instituted in the Court of the lower limit[4] This rule does not apply to village Munsifs established in Madras under Regulation VI, 1816, s 5, to try suits not exceeding ten rupees, and in such cases the Munsiffs and Small Cause Courts possess *concurrent* jurisdiction, and one does not exclude the other[5] As to the present law, see ss 16 and 23, Act IX of 1887 In Act I of 1889, s 13, proviso 3 the word 'land includes land covered by a house, and consequently a suit for house rent, unless due under a written contract signed by the defendant, is not cognizable in a Village Munsiff's Court[6]

Jurisdiction of Small Cause Courts—*General*—A person claiming damages for personal injury where actual pecuniary damage has resulted, has [illegible] art of the claim to damages which is not [illegible] but see, as to the present law, s 15, Act [illegible] ot cognizable by a Small Cause Court, un- [illegible] the defendants[9] A plaintiff whose claim has been disallowed under O XXI r 58 may sue in the Small Cause Court to recover possession of it In substance the suit is for goods, though as a matter of form the decree may contain a declaration The plaintiff may abandon part of his claim so as to bring the suit within the jurisdiction of the Small Cause Court[10] The plaintiff sued to recover from his landlord a sum which the defendant had collected in excess of what was properly due to him by distraint of the plaintiff's cattle *Held*, that the suit was cognizable by a Court of Small Causes[11] A suit for damages for use and occupation of land is cognizable by a Court of Small Causes[12] A suit by a manager of a temple against his predecessor in office for damages sustained by the temple owing to the negligence of the defendant is not cognizable by a Court of Small Causes[13] A suit by a Mahomedan to obtain a share in property distributable under the terms of a certain endowment is not cognizable by a Court of Small Causes[14]

Small Cause Court, Provincial—Under Act IX of 1887, a Small Cause Court has power to try all suits of a civil nature not excluded by the second schedule to the Act, and it is the nature of the suit as described in the

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[1] Koylash Chunder *v* Ashruf, (1874) 22 W R, 101, and see Dattu *v* Kasai, (1884) 8 Bom 535 See 'JURISDICTION, *infra*, and the change introduced by s 11, Act VII of 1887, and note to s 99

[2] Moshingan *v* Mozari, (1886) 12 Calc, 271

[3] Dwarkanath Dutt *v* Bhathu, (1874) 22 W R, 457

[4] Mohanlal *v* Vira, (1888) 12 Bom, 169.

[5] Parasoorama Pillay *v* Ramswamy, (1869) 5 Mad, H. C, 45

[6] Narayanamma *v* Kamakshamma, (1897) 20 Mad, 21

[7] Mansing Lalung *v* Theram, (1874) 22 W. R, 395

[8] Jiva Ram *v* Bhola, (1888) 10 All, 49

[9] Parshotam *v* Puma Harji, (1898) 21 Bom., 121

[10] Raghunath *v* Sarosh Kama, (1900) 23 Bom, 266

[11] Karuppanan *v*. Romasami, (1898) 21 Mad, 239

[12] Vira Pillai *v* Rangasami, (1899) 22 Mad, 149

[13] Krishnayyar *v* Soundararaja, (1893) 21 Mad, 245

[14] Mihr Ali *v* Muhammad Husen, (1892) 14 All, 413

plaint and not the nature of the defence that determines the question of jurisdiction [1] A suit for compensation on account of injury to an oil mill will lie in a Provincial Small Cause Court [2]; so will a suit for damages on account of the use and occupation of land [3], or an account of the forcible cutting and carrying away of grass [4]; or to recover the cost of repairing a channel, the joint property of plaintiff and defendant [5], but not a suit for mesne profits [6], or to recover a legacy when there is no allegation that the executors are in possession of sufficient assets to pay or that they had ever assented to the payment [7], or to establish a right to a standing crop on the basis of title,[8] or for contribution [9], or for arrears of *jodi*, which is rent on favourable terms,[10] or a suit by a retired partner for money alleged to have been agreed to be paid to him by the continuing partners in consideration of his retirement [11] A suit for arrears of maintenance payable under a written agreement does not lie in a Provincial Small Cause Court [12] A suit for the recovery of a certain share of the profits of *inam* villages, the amount claimed being Rs 130, lies in the Court of Small Causes [13] Plaintiffs sued in the Court of Small Causes at Poona to recover Rs 400 for arrears alleged to be payable to them under an agreement by defendant's father to pay Rs 150 *p a*, of which Rs 50 were for maintenance ... idge ... laim ... high ... for ... Court had ... 15 of the ... property ... rried out, ... operty so ... jurisdic ... of 1887 [15]

Presidency Small Cause Court —The jurisdiction given to this Court under s 18 of Act XV of 1882 is not affected by 51 Vic, c 4, s 7 [16] It is the nature of the case as laid and not the defence that determines jurisdiction [17] The Small Cause Court in Bombay has jurisdiction to try a suit against a non resident foreigner, who carries on business in Bombay through a *munim* [18]

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[1] Bapuji v Kuvarji, (1892) 15 Bom, 400

[2] Bunwari Lall v Secretary of State, (1890) 17 Calc, 290

[3] Makhan Lall v Garibullah, (1890) 17 Calc, 541

[4] Krishna Prosad v Maizuddin, (1890) 17 Calc, 707

[5] Fischer v Collector of Madura, (1892) 15 Mad, 155

[6] Sriram v Kalidas, (1891) 18 Calc, 316, the decision in this case was, however, overruled in the Full Bench case of Kunja Behari v Madhab Chundra, (1896) 23 Calc, 884

Okhoy Coomar v Koylash Chunder, (1890) 17 Calc, 387.

Dakhyani v Dole Gobind, (1894) 21 Calc, 430

[9] Bhatu Singh v Rama Mahton, (1896) 23 Calc, 189

[10] Venkatagiri v. Venkat Rau, (1898) 21 Mad., 243

[11] Fauji Lal v Changa Mal, (1897) 19 All, 513

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[16] Watts v Blackett, (1891) 18 Calc., 144; Wallis v. Bailey, (1891) 18 Calc, 372.

[17] Bapuji v. Kuvarji, (1891) 15 Bom, 400 As to stating a case, see Ralli Brothers v Goculbhai, (1891) 15 Bom, 376 As to costs, see Ismail Arif v. Leslie, (1897) 24 Calc, 399.

[18] Girdhar v Kassigar, (1893) 17 Bom, 662 But see Annamalai v Murugasa, (1903) 7 Calc, W N, 754; L. R, 30 I. A., 220; and Tadepalli v. Sayep, (1906) 29 Mad, 69, 239.

Where a contract provided for the delivery of goods in two monthly shipments by the plaintiffs and the defendants refused to take delivery or pay for either shipments of the goods in accordance therewith, it appeared that the total amount of the damages sustained by reason of the two breaches if added together, exceeded Rs 2,000, whereas if taken separately they were respectively less than that amount. The contract provided that each shipment was to be treated as to separate contract. *Held*, that the plaintiff was entitled to bring separate suits for the damages sustained in respect of each shipment, and that, therefore, the Presidency Small Cause Court had jurisdiction.[1]

Madras City Civil Court.—A house was attached and sold as the property of one against whom a decree of the Small Cause Court, Madras, had been passed. The property was brought to sale and the purchase money was paid into the Madras City Civil Court. The sale was set aside under s 310A, Act XIV of 1882. Part of the purchase money was attached in execution of subsequent decrees passed against the same defendant by the Small Cause Court and was remitted to that Court under the attachment. On an application by the purchaser for the refund of the purchase money by the various persons who had received portions thereof *held*, that the City Civil Court had jurisdiction to entertain the application.[2]

Court of Cantonment Magistrate.—See *Sundardas* v *Mohandas*.[3]

Court of Requests.—*Shere Ali* v *Prendergast*.[4]

Revenue Courts.—*North West*. Under Act XVIII 1873 a suit for possession of a holding by a tenant against his landlord should be instituted in the Revenue Courts,[5] and in a suit to eject a tenant holding over, the Civil Courts will not have jurisdiction even if the suit for ejectment is combined with a claim for mesne profits,[6] but this Act does not preclude the Civil Courts from taking cognizance of a suit to recover possession, on the averment that the plaintiffs are occupancy ryots, and mesne profits against third persons setting up an adverse title[7] or of a suit to recover possession, of *sir* land on the ground that defendants have taken possession without any right,[8] or a claim of one joint owner against another,[9] though a mere declaration that a tenant is only a tenant at will cannot be obtained in any Court[10] nor will a suit lie to determine the status of persons admittedly tenants.[11] Revenue Courts cannot hear a suit concerning profits of land, arising between the heir of a lambardar and his co sharers[12] nor a suit for rent by an assignee of the landlord,[13] not a suit for declaration of right in land as *sir* land,[14] nor to

[1] Volkart *v* Sabju Saheb (1896) 19 Mad 304

[2] Vira Sami *v* Liladhara (1898) 21 Mad 398

[3] (1885) 9 Bom, 454

[4] (1886) 13 Calc, 143

[5] Muazzim Ali *v* Sheo Parshad (1874) 7 All H C 259, Childu *v* Narpat (1886) 8 All, 62

[6] Ram Autar *v* Talimundi, (1874) 7 All H C, 49

[7] Mata Pershad *v* Janki (1874) 7 All H C, 226, Raghobar Misser *v* Sital, id 228

[8] [illegible]

[9] [illegible]

[10] [illegible]

[11] [illegible] *v* Swarath Rai, (1893) 15 All 115

[12] Ahmaduddin *v* Majlis, (1883) 5 All, 438

[13] Ganga Prasad *v* Chandrawati (1885) 7 All, 256 and see Autu Singh *v* Ajudhia, (1817) 9 All, 249

[14] Kauleshar Panday *v* Girdhari (1885) 7 All 338 and see Sheodisht *v* Rameshar, (1885) 7 All 188 Madho Singh *v* Ajudhia (1888) L. R, 15 I A, 77; 15 Calc, 515, Mahadeo Singh *v* Bachu Singh, (1889) 11 All, 224

determine a right to rent against a person claiming as landlord,[1] nor a suit to restrain a tenant from changing the nature of his holding,[2] nor to remove trees[3]

Settlement Officers cannot determine the rights of contending parties in the soil[4] Where a lambardar brought a suit for arrears of land revenue payable by the proprietors against several defendants, of whom some were co-sharers and others mortgagees in possession, *held* that such suit was one of the nature contemplated by s 93 (*g*) of the N W P Rent Act 1881, and was cognizable by a Court of Revenue as against all the defendants[5] The plaintiffs alleging themselves to be occupancy tenants and to have been wrongfully dispossessed by their landlords who had made a lease of lands in suit, sued the landlords and their lessees for recovery of possession and for damages *held* that such a suit was exclusively cognizable by a Revenue Court[6] The reason which a land holder may have for desiring to eject a tenant of agricultural land, has nothing to do with the procedure to be adopted for the tenants ejectment When the procedure laid down in s 36 *et s*, of the N W P Rent Act, 1881 is available, the land holder must adopt that procedure and the mere fact that the land holders alleged cause of action is the denial by the tenant of the land holders title will not give the land holder a right to sue for ejectment in the Civil Court[7] S P and others, zemindars sued M K and others as trespassers to eject them from certain land alleged to form part of the plaintiff's zemindari The defendants pleaded that they were mortgagees holding under a mortgage with possession given by one S G, said to be tenant at fixed rates, of the land in suit It was found that S G had been an occupancy tenant not at fixed rates, but that he had died without heirs prior to the institution of the suit *Held*, that the suit brought under the above circumstance, was cognizable by a Civil Court[8]

Bengal—By Act VIII (B C) of 1869 Revenue Courts were abolished over the greater part of Bengal and the trial of rent suits was made over to the ordinary Civil Courts It is now regulated by Act VIII of 1885 This *question of* jurisdiction can but seldom arise It has been held that a Court was not justified in dismissing a suit wrongly instituted under Act VIII (B C) *of 1869 if it* could give relief under the ordinary procedure[9] if necessary, it should allow the plaint to be amended[10] A suit for enhancement not cognizable *under* the rent law may be brought under the ordinary procedure[11]

Objections to jurisdiction how raised—A Court cannot try a cause where there is no jurisdiction if it did, it would be nothing *more than a* private arbitrator,[12] and submission by the defendant cannot oust the jurisdiction of the Appellate Court to set the decision aside[13] but it has been held

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[4] [illegible] (1885) 7 All [illegible]

[illegible] Altaf Ali v Lalta

[illegible] ahtoon v Ramkhela

[12] [illegible] 134 p 145 9 All 191 (1887) Bhopen [illegible] W R, 205 Government of Bombay [illegible] C, 242, Aukil Chunder v Moheenee [illegible] ee Foster v Usherwood, (1878) 3 Ex [illegible] Hatem, (1904) 31 Calc, 849, 8 Calc

in England that, where a Judge acts *ultra vires* by consent, no appeal lies;[1] though if the person who is cast by the decision succeeds in first appeal, he cannot object to a second appeal[2] In India where an appeal lies, appeals have been always allowed on the question of jurisdiction[3] If the objection is not raised till a late stage, and the jurisdiction is doubtful, the proper course is to proceed and determine the suit[4]

Regular Appeal—When no objection to the jurisdiction of the first Court was raised in the grounds of appeal, and the first Appellate Court declined to hear the question argued, it was held that the objection should have been considered and decided[5] otherwise, if it were only an irregularity,[6] and when a Judge acted without jurisdiction, their lordships of the Privy Council set aside the decree, although the point was not raised either in the first Court or the Court of Appeal in India[7]

Consent—Where a Court has no jurisdiction, no consent of parties can give it jurisdiction[8] But by s 20 of the Presidency Small Cause Court Act, XV of 1882, it is provided that 'when the parties to a suit which, if the amount or value of the subject matter thereof did not exceed two thousand rupees, would be cognizable by the Small Cause Court, have entered into an agreement in writing that the Small Cause Court shall have jurisdiction to try such suit, the Court shall have jurisdiction to try the same although the amount or value of the subject matter therof may exceed two thousand rupees

Waiver There cannot be a waiver of jurisdiction[9] The fact of a defendant not subject to the jurisdiction of a Court having waived his privilege in previous suits brought against him does not give the Court jurisdiction to entertain a suit against him in which he pleads that he is not subject to such jurisdiction[10]

Objection to jurisdiction, when it may be raised—An objection to jurisdiction the validity of which is patent on the face of the proceedings, can be taken at any stage of the proceedings[11] Such an objection can even be taken for

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[2] Bickett v Morris (1866 9) L R, I H L S C, 47

[3] Naro Hari v Anpurnabai (1887) 11 Bom 160 Ledgard v Bull (1885) L R 13 I A 134 at p 145, (1887) 9 All 191 Minakshi v Subramaniya, (1884) L R, 14 I A, 160, 11 Mad 26, Bishenmun v Land Mortgage Bank 11 Calc, 244 at p 248, L R, 12 I A, 7

[4] Bagram v Moses (1823) 1 Hyde, 284 See Abdulullah v Asraf Ali (1907) 7 Calc L J 152

[5] Motilal Ramdas v Jamnadas, (1864) 2 Bom H C, 40

[6] Ram Kishen v Dipa (1891) 13 All, 580

[7] Har Narain v Bhagwant Kuar, (1891) 13 All, 300, L R, 18 I A 55

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[4] [illegible]

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[8] [illegible] See also Altaf Ali v Lalta

[9] Jallaloodeen v Burne (1872) 18 W R, 99, Gobind Mahtoon v Ramkhelawan, (1874) 22 W R 478

[10] Gobind Chunder v Bykuntnath, (1873) 19 W R 161

[11] Poresh Narain v Watson, (1878) 3 C L R, 543

[12] Lalmoney Dossee v Judoonath Show, 1 Ind J (N S) 319

[13] Ledgard v Bull, (1885) L R, [illegible]

W. N, 100

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[8] Aukhil Chunder v Mohiny Moha- [illegible] Bombay v Ranmul Singhji, (18[illegible] Kalee Prosanno, (1895) 24 W [illegible] 266, Aklemonnissa v Mahon [illegible] W N, 705

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[11] Sidheshwar [illegible] 7 All, 2 [illegible] Koonwar [illegible] (1865) 52 [illegible]

the first time in second appeal,[1] or in second appeal after remand by the High Court[2] Generally, the plea of want of jurisdiction will not be listened to in special appeal, if not raised in the Courts below, unless it arises clearly upon the pleadings or from the admissions of the parties,[3] but if it appears, on the face of the proceedings the Court must take notice of it[4] If a party protest against jurisdiction he is not bound to retire, he can go through the case subject to the protest[5]

When it may not be raised—After years of litigation in execution proceedings the Court of first instance was held to be justified in refusing, in a suit brought to have errors in those proceedings corrected, to raise an issue as to the jurisdiction of the Court to entertain those proceedings[6]

Costs—As to costs when the plea of no jurisdiction is allowed in special appeal, see *Aftabood Lien* v *Mohini Mohun Dass*[7]

Form of order—When an objection to jurisdiction is raised and allowed at an early stage of the case the plaint should be returned to be presented to the proper Court[8] In Bengal there is no uniform practice[9] In Madras the Court either dismisses the suit or appeal, or returns the plaint[10] In *Ledgard* v *Bull*, *infra* [11] their lordships of the Privy Council stated "that the Court should have given the plaintiff the alternative of having his suit dismissed or of withdrawing it with leave to bring a new action"

No Jurisdiction—The leading case on jurisdiction is *Ledgard* v *Bull*[11] This was a case under the Patent Act and should have been instituted in the District Court It was instituted in the Court of the Subordinate Judge, and defendant pleaded that the Court had no jurisdiction, and though subsequently he consented to have the case removed into the District Court he did not withdraw the objection to jurisdiction Their lordships said—"The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a
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[1] Nyamtulla v Nanavalad, (1889) 13 Bom, 424, Velayadam v Arunachala (1890) 13 Mad, 273

[2] Keshav v Vinayak, (1899) 23 Bom, 22

[3] Nymoodlee Joarlur v Moncrieff (1869) 12 W R 140, 3 B L R, 283 and see remarks of Bovill, C J in Revell v Blake (1871 2) L R, 7 C P, 300 (1872 3) 8 L R C P 533

[4] Ladli v Rajee Rabia (1889) 13 Bom, 650, Manikshi v Subramanya supra, see also Chundee Churan v Eduljee (1882) 8 Calc 678

[5] Hamlyn v Betteley (1880 1) 6 Q B D, 63, Ledgard v Bull, *supra*

[6] Ne[illegible] R, 303 See also Mohun [illegible] 1, Radha Gobind v Ooma [illegible] v Ashruf Ali (1874) 22 [illegible] 22 W R, 126, Ooma [illegible] Venkata Vira Ragava v [illegible]

[7] [illegible]

[8] [illegible] rule in Bombay [illegible], 313, even in [illegible]

[9] Joynath Roy v Lall Bahadoor Singh, (1882) 8 Calc, 126

[10] Sonachala v Mankia (1885) 8 Mad, 516, but see Muttirulandi v Kottayan (1887) 10 Mad, 211

[11] (1885) L R, 13 I A, 134 This case was followed and approved in the case of Minakshi v Subramanya, (1886) L R, 14 I A 160, (1888) 11 Mad, 26 See also Vishnu Sakharam v Krishnarao (1887) 11 Bom, 153, Naro Hari v Anpurnabai, (1887) 11 Bom, 160, Ladli v Raje Rabia, (1889) 13 Bom, 650

conduct from objecting to irregularities in the institution of the suit When a Judge *has no inherent jurisdiction over the subject matter of suit*, the parties ... though they ... sion on the ... authorities ... *to try*, the ... defendant ... there were ... ime, would ... *me* strictly within those authorities, because the defendant's plea was stated before issue was joined on the merits, and in reliance on that plea, he objected to the case being tried and *withheld his objections to the validity of the patent*" Their lordships then found that defendant had not consented to the case being tried by the District Judge, and dismissed the suit

The plaintiffs sued the defendant for partition of family property, which consisted both of moveable and immoveable property The moveable property was within the jurisdiction, but all the immoveable property was outside the jurisdiction of the Court *Held* that the Court had no jurisdiction to hear the suit [1] The plaintiff sued for partition of certain property alleging it to be joint family property It consisted of a house in Bombay and certain fields at Valva in the Thana District The parties were all resident in Bombay *Held*, that as to the Valva property the Court had no jurisdiction but the suit might proceed as regards the property in Bombay [2] Where the plaintiffs brought a suit for their share of family property consisting of lands situated outside the jurisdiction of the High Court and for moveables situated within it it was held that the High Court had no jurisdiction as to the lands [3]

Alternative Relief—Where plaintiff claims different reliefs to some of which he is not entitled, jurisdiction depends on the other reliefs [4]

Irregularity in exercise of jurisdiction—In *Sadasiva Pillai v Ramalinga Pillai*,[5] their lordships of the Privy Council, referring to a question of *mesne* profit under a decree, h... that the respondent did come unde... subsequent mesne profits of the... enforced by proceedings in execu... 11th section of the Act of 1861 ...

matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular The case, therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani v Attorney General of Gibraltar* [6] in which the parties were held to an agreement that the

[1] Jairam v Atmaram (1880) 4 Bom 482

[2] Balaram v Ramchunder (1898) 22 Bom, 922

[3] Seshageri v Rama Rau (1896) 19 Mad 448 As to where there is jurisdiction in part see Leslie, in the matter of (1872) 9 B L R, 171 p 175 18 W R 269 Sree Nath v Cally Dass (1880) 5 Calc 82 but see Holkar v Dadabhai, (1890) 14 Bom, 353, Punchanun v Shib Chunder, (1868) 14 Calc 835

[4] Nanda Kumar v Ishan (1868) 1 B. L. R, 91, Lakshman v Babaji, (1884) 8 Bom, 31

[5] Sadasiva Pillai v Ramalinga Pillai (1875) 15 B L R, 383 24 W R, 193; L R 2 I A 219 followed in Kamizuddi v Fauzdar (1906) 4 Calc, L J, 311, (1906) 10 C W N 850

[6] Pisani v Attorney General of Gibraltar (1873 4) L R 5 P C, 516 See also Brooke v Wigg (1878) 8 C D, 510 Fakhruddin Mahomed v Official

questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiae*. Again in the case of *Rewa Mahton v Ram Kishen*[1] the High Court had held that execution proceedings not carried on as required by s 416 (O XIV rr 1 2) of this Code were null and void. Their lordships in setting aside that decision said :— 'A purchaser under a sale in execution ... ss judgment of a ... case to inquire ... tisfied or not. *If* ... nquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues.' So it has been held that the omission to record reasons for admitting new evidence as directed in O XLI r 26 (Act XIV of 1882) is only an irregularity and does not touch jurisdiction ;[2] so where the Judicial Commissioner of Mysore struck a pleader off the rolls without hearing him, although the Act declared that 'notwithstanding anything hereinbefore contained, no pleader shall be suspended or dismissed under this Act, unless he has been allowed an opportunity of defending himself' the order was set aside on the ground of irregularity only ;[3] and where a suit cognizable by a Munsif was brought contrary to the corresponding section of Act VIII of 1859 in the Court of a Subordinate Judge it was held that the Court had power to try the case by virtue of the Civil Courts Act and this power was not affected by the prohibition in Act VIII which was merely a procedure code.[4]

Holiday.—A party who on a close holiday does attend and without protest takes part in a judicial proceeding cannot afterwards successfully dispute the jurisdiction of the Judge to hear and determine such matter.[5] See also s 15 of Act XII of 1887 cl (3) which lays down that a judicial act done by a Civil Court on close holiday shall not be invalid by reason of its having been done on that day.

Officer not appointed.—As to objections to jurisdiction on the ground that the officer whose act is impugned was not properly appointed or was disqualified, see *Glyn v Bonnoud*[6] and cases there cited. Acts done by Justices in a judicial character have in no instance been thought invalid.[7] As to the validity of the appointment of a Judge appointed to act as a Judge of the High Court.[8]

Suits to be instituted where subject matter situate

16 Subject to the pecuniary or other limitations prescribed by any law, suits—

(*a*) for the recovery of immoveable property *with or without rent or profits*,

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Trustee (1880) L R, 8 I A 197 (1882) 8 Calc, 178, Khemua Gawala v Budaloo Khan (1880) 6 Calc, 201 Dinonath v Guruchurn (1874) 14 B L R, 287 See also the case of Vishnu v Krishnarao, (1887) 11 Bom, 153

[1] Rewa Mahton v Ram Kishen (1886) L R, 13 I A, 106, (1887) 14 Calc, 18

[2] Gunga Gobind v Collector of 24 Pargannahs (1867) 11 Moo I A. 345, 7 W P, P C, 21

[3] Southekul Krishna Row, in the matter of (1886) L R 14 I A, 154

[4] Russick Chunder v Ram Lall (1874) 22 W R 701 See Nidhi Lal v Mazhar Husain (1885) 7 All 230 And the remarks of James L J, in Dale's case L R, 6 Q B D 376 p 451

[5] Ram Das, v. Official Liquidator, (1917) 9 All, 366

[6] Glyn v. Bonnoud, 2 Taylor and Bell, pp 205, 224

[7] Margate Pier Co v Hannam, 3 B and Ald, 266

[8] Queen Empress v Ganga Ram, (1891) 16 All 136, Palwant Singh v Ram Kishore (1898) 20 All, 297 L R, 25 I A, 54

(b) for the partition of immoveable property,

(c) for foreclosure, *sale* or redemption *in the case* of a mortgage of *or charge upon* immoveable property,

(d) for the determination of any other right to or interest in immoveable property,

(e) for compensation for wrong to immoveable property,

(f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, *where* the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate or in the Court within the local limits of whose jurisdiction *the defendant* actually and voluntarily resides, or carries on business, or personally works for gain

Explanation—In this section "property" means property situate in British India

Act XIV 1882 of Section 16—This section applies to Prov S C C and to the H C *but not in its original civil jurisdiction* See section 120 post

The words 'with or without rent or profits' have been added to sub section (a) to remove any difficulty there might have been under Act XIV of 1882 in suits to recover rent in addition to land

Immoveable Property—By sect 12 of the Charter of 1866 the High Court has jurisdiction in the case of suits for land or other immoveable property situated within the local limits of its original jurisdiction and under this section it has been held that the following amount to such suits

Suits for foreclosure or redemption of land against a receiver in possession of lands after the mortgagee has foreclosed [1] asking for an account and to redeem,[2] for specific performance of a contract to sell land outside the jurisdiction [3] Against trustees to carry out the terms of a trust deed executed by A for himself and B and compel the sale of lands outside Calcutta where B denies A's authority to act for him [4] to restrain persons working a mine in the mofussil beyond a certain line [5] for specific performance to execute a mortgage of

[1] Juggodumba v Puddomoney (1875) 15 B L R 318

[2] Denonath v Hogg (1863) 1 Hyde 141

[3] Hunsraj v Runchor Das (1905) 7 Bom L R 319

[4] Delhi Bank v Wordie (1876) 1 Calc 249 (1876) 25 W R 2 2 explained in Keller v Fraser (1877) 2 Calc p 47

[5] East Ind Ry Coy v Bengal Coal Coy (1876) 1 Calc 95

lands[1] or for partition[2] This term and the expression "interest in immoveable property" are to be held to include not only land and houses and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property, so called, *e g*, rights of common, rights of way and other profits, as for instance rents, pensions and annuities secured upon land[3] The equity of redemption of the mortgagor is immoveable property which can be attached and sold under s 266 (sec 60 of this Code)[4] A tree standing on land is immoveable property,[5] so are standing crops[6] and tiled huts,[7] but tiled huts are moveable property for all purposes of execution under s 28 of the Presidency Small Cause Court Act, (XV of 1882)[8] But this only means that as between the judgment debtor and the judgment creditor, they shall for the purposes of execution be deemed to be moveable[9]

In Madras, it has been held that the right to mesne profits under a decree s not immoveable property[10]

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Interest in immoveable property—The following suits have been held to be suits for an interest in immoveable property —A suit for possession and for opening a water course is a suit for an interest in immoveable property,[14] A suit for the recovery of unpaid purchase money under a

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[1] Sreenath v Cally Doss (1880) 5 Calc, 82, *contra*—Holkar v Dadabhai, (1890) 14 Bom, 353, Sorabji Cursetji v Rattonji, (1898) 22 Bom, 701

[2] Jairam v Atmaram, (1880) 4 Bom, 482

[3] Collector of Thana v Krishna Nath, (1881) 5 Bom, 322

[4] Parashram v Govind Ganesh, (1897) 21 Bom, 226

[5] Sakharam Mulshet v Vishram, (1895) 19 Bom, 207 Pandurang v Bhimrav (1898) 22 Bom, 610 See also Bapu v Dhondi (1892) 16 Bom, 353 Tofail Ahmud v Banee Madhub, (1875) 24 W R 394, Seeni Chettiar v Santhanathan, (1897) 20 Mad, 58, Krishna Rao v Babaji, (1900) 24 Bom, 31.

[6] Cheda Lal v Mulchand, (1892) 14 All, 30, Madayya v Venkata (1888) 11 Mad, 193, Ganga Prasad v Narain, (1893) 15 All, 394 But see Surat Lal Mondal v Umar Haji, (1895) 22 Calc 877, and Mangun Jha v Dolhin Golab (1898) 25 Calc, 693, (1898) 2 Calc W N, 265

[7] Raj Chunder v Dhurma Chunder (1868) 10 W R, 416 Nattoo Meah v Nund Ranee, (1872) 17 W. R, 309, Rohini Kant v Mahabbirath, (1868) 10 W. R, 258

[8] Denonath v Nuffer Chunder, (1899) 26 Calc, 778, (1899) 3 Calc W N, 690, followed in Ganapathy v Thakurdyal (1907) 34 Calc, 823 Also see Kasichandra v Jodu Nath, (1868) 10 W R, 29

[9] Deno Nath Batyabal v Adhor Chunder Sett, (1900) 4 Calc. W. N, 470

[10] Saminatha v Nanikka Sami, (1899) 22 Mad, 356.

[11] Tadu Jhala v Gour Mohun, (1892) 19 Calc, 544, Natabar Parue v Kubir Parue, (1891) 18 Calc, 80

[12] Mangal Das v Jewan Ram, 23 Bom, 673

[13] Krishna v Akilunda, (1890) 13 Mad, 54

[14] Oodoyessurree v Huro Kissore Dutt, (1865) 4 W R, 107, See as to meaning of somewhat similar words—Inder Kumari v Jaipal Kunwar L R, 15 I A, 127, p 143, (1887) 14 Calc, 290 Anand Kunwar v Court of Wards, (1881) L R, 8 I A, 14 p 22 6 Calc, 764

contract for sale of land [1] and so is a suit to have certain mortgaged lands declared liable for the debt [2] So also is suit a brought to enforce payment of principal and interest both as a simple contract liability and as a debt secured by a collateral mortgage of immoveable property [3] So is a suit for a declaration that lands are mortgaged or charged with a debt and to have them sold in execution notwithstanding a later disposition,[4] or a suit for a sum of money where plaintiff asked that the decree should be enforced against the person of the borrower and the property pledged [5]

favour an assignment of rent not due, annual allowances charged on the reve territory and paid to the defendants by in the same territory are immoveable determined according to the law in force in the Nizams dominions Plaintiffs could not claim a declaration of title or ask for a refund of the allowance in a British Court merely because the defendants happened to be residents in British territory

A claim to an easement is one relating to an interest in land [8] A bond whereby the superstructure of the land beneath is hypothecated creates an interest in immoveable property [9] The right to possession and management of a *saranjam* is an interest in immoveable property [10] The life interest of a widow in the income arising from the lands of her husbands estate is immoveable property [11]

A suit to follow the purchase money of land taken up under the *Land Acquisition Act* over which the plaintiff had a mortgage lien is not a suit under cl (*d*) [12] Neither is a suit to enforce a contract for the purchase of land or in the alternative for damages [13] A right to be placed on the revenue register is not an interest in immoveable property [14]

A suit to recover *baluti* leviable on the crops of village lands is not a suit for an interest in land [15] nor is a suit to recover a sum of money due by custom as an emolument of an hereditary office [16] An agreement to grant a lease cannot be said to create an interest in immoveable property [17] The right to possession and management of a *saranjam* is an interest in immoveable property [18] *Sayer* is not an interest in immoveable property [19]

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[1] Maturi v Kotais (1905) 28 Mad 227

[2] Ram Lal v Chittro Coomaree (1871) 15 W R 277

[3] Krstna Row v Huchappa (1864) 2 Mad H C 307 Juneswar v Mahabeer (1875) I R 3 I A 1 1 Calc 163 25 W R 84

[4] Surwan Hossein v Gholam Mahomed (1868) 9 W R, 170

[5] Munno Lall v Pigue (1868) 10 W R 379

[6] Hall ex parte Whitting in re (1878 9) 10 C D 615

[7] Keshav v Vinayak (1899) 23 Bom 22

[8] Deosurun v Mahomed Ismail (1875) 24 W R 300 So is a *Julkar*—Parbutty Nath v Madho Paroe (1878) 3 Calc 276

[9] Narayana v Ramaswami (1875) 8 Mad H C 100

[10] Narayan Jagannath v Vasudeo Vishnu (1891) 15 Bom, 247

[11] Natha v Dhanbaiji (1899) 23 Bom 11

[12] Venkata v Kiishnasami (1883) 6 Mad 344

[13] Land Mortgage Bank v Sudurudleen Ahmed (1892) 19 Calc 358 referred to Jagadis v Satrughan (1906) 33 Calc 1065

[14] Bhikaji Baji v Pandu (1893) 19 Bom 43

[15] Naru v Naro (1879) 3 Bom 28

[16] Lathna Mudaliar v Tiruvenkata (1899) 22 Mad 351 See however, Appan v Nagia (1882) 6 Bom 512

[17] Lalla Ram v Chowbain (1874) 22 W R 257

[18] Narayan Jaggannath v Vasudeo Vishnu 15 Bom, 247

[19] Surendro v Kedar Nath, (1892) 19 Calc, 8

The property is situate —In a suit on a mortgage and money bond in a district other than that in which the property is situated, the Court has no jurisdiction to pass any but a money decree leaving the Court of the district in which the property is situated to execute it against the property mortgaged [1] So a mortgage decree passed by a Court other than that described in the section can be only looked on as a money decree [2]

Mortgage Charge —A Court has power to give a decree for mortgaged property situate within its jurisdiction though the mortgage of which redemption is sought includes property without the jurisdiction [3] but it cannot declare a charge on property wl ... does, a purchaser under such a decree would n ... rchaser under a money decree [4] A suit by ... debt from the mort ... sale of the mortgaged property is a suit under ... that Court ... ituate [5]

... able property relief by ... —Under ... redemption of land in the Mofussil are ... ases above mentioned), and only a limited ... A suit to declare that a person resident in ... Mofussil, subject to certain trusts, is not a s... in Calcutta [6] neither is a suit to enforce the right of parties to act as co shebaits to an idol endowed ... lands in the Mofussil, where possession of any land is not claimed [7] ... to sell lands outside Calcutta, [8] ... Howrah, [9] nor a suit by ... eived by another, although ... asking for a sale ... ing from a dispute ... o lands outside, [12] ... land in the plaintiff's ... for an injunction [14]

The proviso to s ... at the relief sought should be entirely obtainable through the personal obedience of the defendant, but also that he should reside within the jurisdiction of the Court in which the suit is filed [15]

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1 Mahomed Khuleel v Sona Kooer, (1875) 23 W R, 123 See also Baldeo Doss v Mool Kooer, 2 All H C, 19, and Gomatham Alamelu v Komandur Krishnama Charlu, (1904) 27 Mad, 118

2 Gudri Lal v Jagannath, (1886) 8 All, 117, and see Premchand v Mokhoda, 17 Calc, 699

3 Girdhari v Sheoraj (1877) 1 All, 431, and see Bolakee Lall v Thakoor Pertam, (1880) 5 Calc, 928

4 Gudri Lall v Jagannath, (1886) 8 All 117

5 Vithalrao v Vaghoji (1893) 17 Bom, 570, Ahmedee Begum v Deba Persaud, 18 W R 287 Mahomed Khuleel v Sona Kooer, (1875) 23 W R, 123, *Ram Lall v Chittro Coomaree (1871) 15 W R, 277*

6 Bagram v Moses (1862 3) 1 Hyde 284

7 Juggodamba v Puddamoney, (1875) 15 B L R, 318

8 Ramdhone Shaw v Nobumoney Dossee, Bourke 218, Holkar v Dadabhai (1890) 14 Bom, 353, but see Sreenath Roy v Cally Doss, (1880) 15 Calc, 82

9 Rajmohan Bose v East Indian Railway, 10 B L R, 241

10 Chintaman Narayan v Madhavarav, 6 Bom H C, 29

11 Yenkoba v Rambhaji, 9 Bom. H C, 12, p 13, Holkar v Dadabhai (1890) 14 Bom, 353

12 Kellie v Fraser, (1878) 2 Calc, 445

13 Juggernauth Doss v Brijnath, (1879) 4 Calc, 322, 3 C L R, 375

14 Crisp v Watson, (1893) 20 Calc, 689

15 Isak v Khatiji, (1899) 23 Bom., 756

The Sudder Dewany Adawlut declined to take cognizance of a suit for the title deeds of property in Calcutta, by a person claiming as a Hindu widow [1]

The plaintiff sued in the Court at Nasik in British India to establish his right to a share in the income derived from certain grants of land outside British India but received by the defendant within the jurisdiction of the Nasik Court *Held*, that the suit was within the jurisdiction of the Court, as it was not a suit in respect of immoveable property [2]

This section determines the powers of the Courts to act *in personam*, when ... jurisdiction The ... entirely obtained ... t claimed by the ... tween persons re siding within jurisdiction respecting lands outside it Thus, it is doubtful whether our Courts will be able to entertain suits for foreclosure or sale of property beyond their local jurisdiction [3]

Actually and voluntarily resides —The Supreme Courts established at Calcutta, Madras and Bombay were empowered to try "all and all manner of ... singular the *inhabitants* of the said Calcutta, ... rd ' inhabitant for the purpose of "jurisdic ... id not include a person having daily employ ment in Calcutta, but residing outside it, and coming in the morning and return ing in the evening[5] but otherwise when in addition he often slept at his father's house in Calcutta[6] or where though carrying on business all day in Calcutta and earning his livelihood he slept in Entally at night to *avoid jurisdic tion* [7]

Length of time —No length of time was necessary to make a person an inhabitant[8] and a man who had come to Calcutta with no definite object, but slept there, and the plaint was filed when he was in Calcutta, was held subject to the Court's jurisdiction [9] The Bombay Court held that *residence at the time of the contract* or at the commencement of the suit was sufficient [10]

Evidence —A bond reciting the obligor to be ' of Calcutta was *primâ facie* evidence that he was an inhabitant [11]

Voluntary —But the residence must have been voluntary [12] A person confined in jail without just cause having been brought down from the mofussil by process in a suit as to which he had been discharged for want of proceeding, was not considered to be an inhabitant [13] Otherwise if he had been lawfully

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[1] Bussunt Koomaree v Kummul Koomaree 7 S D A Sel 168 but see Juggernath Doss v Brijnath Doss 4 Calc 322 3 C L R 375

[2] Kashinath v Anant 24 Bom 407

[3] Paget v Ede L R (1874) 18 Eq 118 and in regard to this case, the case of East Indian Railway Co v Bengal Coal Co (1876) 1 Calc, 95, Delhi Bank v Wordie (1876) 1 Calc 249 Longdendale Cotton Spinning Co, *in re* 8 C D 150 Holkar v Dadabhai (1890) 14 Bom, 353

[4] Ram Narain Tauker v Chederaula Nursiah 1 Mor, 371

[5] Goculchund Bonnerjee v Camdeb Mookerjee, 1 Mor, 371

[6] Habberley v Bason 1 Mor 371

[7] Martindell v Donan 1 Mor, 371 Bhanoo v Hossein Ali 1 Mor 371

[8] Madoo Wissenauth v Balloo Gunnasett, 1 Mor, 370

[9] Punchanand Bose v Davison 1 Mor 371

[10] Madoo Wissenauth v Balloo Gunnasett *supra*

[11] Ramram Datt v Ramnarain, 1 Mor, 369

[12] Madoo Wissenauth v Balloo Gunnasett, *supra*

[13] Duhan v Mendes 1 Mor, 370

The property is situate —In a suit on a mortgage and money bond in a district other than that in which the property is situated, the Court has no jurisdiction to pass any but a money decree, leaving the Court of the district in which the property is situated to execute it against the property mortgaged [1] So a mortgage decree passed by a Court other than that described in the section can be only looked on as a money decree [2]

Mortgage Charge —A Court has power to give a decree for mortgaged property situate within its jurisdiction, though the mortgage of which redemption is sought includes property without the jurisdiction, [3] but it cannot declare a charge on property wholly outside its jurisdiction, if it does, a purchaser under such a decree would not be in a better position than a purchaser under a money decree [4] A suit by a mortgagee to recover the mortgage debt from the mortgagors personally as well as by sale of the mortgaged property is a suit under cls (c) and (d) of s 16 (Act XIV of 1882) and can only be instituted in that Court within the local limits of whose jurisdiction the mortgaged property is situate [5]

Not immoveable property relief by personal obedience —Under the Charter, suits for foreclosure or for redemption of land in the Mofussil are excluded as being suits for land (see cases above mentioned), and only a limited relief can be given against the individual A suit to declare that a person resident in Calcutta holds certain lands in the Mofussil, subject to certain trusts, is not a suit for land, and may be tried in Calcutta,[6] neither is a suit to enforce the right of parties to act as co shebaits to an idol endowed with lands in the Mofussil, where possession of any land is not claimed [7] nor is a suit for specific performance of a contract to sell lands outside Calcutta, [8] nor a s[illegible] for an [illegible], [9] nor a suit by [illegible] another, although [illegible] asking for a sale [illegible]ing from a dispute regarding a partnership entered into in Calcutta in regard to lands outside, [12] nor a suit to recover title deeds [13] nor a suit for trespass to land in the plaintiff's possession outside the limits of the Court's jurisdiction, and for an injunction [14] The proviso to s 16 (Act XIV of 1882) requires not only that the relief sought should be entirely obtainable through the personal obedience of the defendant, but also that he should reside within the jurisdiction of the Court in which the suit is filed [15]

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[1] Mahomed Khuleel v Sona Kooer, (1875) 23 W R, 123 See also Buldeo Doss v Mool Kooer, 2 All H C, 19, and Gomatham Alamelu v Komandur Krishnama Charlu, (1904) 27 Mad, 118

[2] Gudri Lal v Jagannath, (1886) 8 All, 117, and see Premchand v Mokhoda, 17 Calc, 699

[3] Girdhari v Sheoraj, (1877) 1 All, 431, and see Bolakee Lall v Thakoor Pertam, (1880) 5 Calc 928

[4] Gudri Lall v Jagannath (1886) 8 All 117

[5] Vithalrao v Vaghoji, (1893) 17 Bom, 570, Ahmedee Begum v Deba Persaud, 18 W R 287 Mahomed Khuleel v Sona Kooer, (1875) 23 W R 123, Ram Lall v Chittro Coomaree, (1871) 15 W R, 277

[6] Bagram v Moses (1862 3) 1 Hyde, 284

[7] Juggodumba v Puddamoney, (1875) 15 B L R 318

[8] Ramdhone Shaw v Nobumoney Dossee, Bourke 218, Holkar v Dadabhai (1890) 14 Bom., 353, but see Sreenath Roy v Cally Doss, (1880) 5 Calc, 82

[9] Rajmohan Bose v East Indian Railway, 10 B L R, 241

[10] Chintaman Narayan v Madhavarav, 6 Bom H C, 29

[11] Yenkoba v Rambhaji, 9 Bom H C, 12, p 13, Holkar v Dadabhai (1890) 14 Bom, 353

[12] Kellie v Fraser, (1878) 2 Calc, 445

[13] Juggernauth Doss v Brijnath, (1879) 4 Calc, 322, 3 C L R, 375

[14] Crisp v Watson, (1893) 20 Calc, 689

[15] Isak v Khatija, (1899) 23 Bom, 756

races, he was dwelling within jurisdiction[1] In the case of *Orde* v *Skinner*,[2] Skinner, at the time of suit was actually residing at Mussoorie in the district of Saharunpore He resided there during the hot weather, and during the cold weather he travelled through the joint estate putting up sometimes at Hansi, sometimes at Delhi, and sometimes at Bilaspur in one of the houses kept at the expense of the estate The question for decision was, "did Skinner reside at Bilaspur?" Their lordships held he could have more than one residence, that as he was not a mere manager, but a part owner, and had a residence there which his predecessor contemplated to be the principal place of residence of the family and in which Skinner kept the accounts of the estate, he dwelt in it within the meaning of s 5, Act VIII of 1859[3] When a person resides at one place, his mere casual presence, or even residence for a temporary purpose within jurisdiction without the intention of remaining is not "dwelling" within the meaning of the Small Cause Court Act[4] Where a servant, whose home was in Nuddea, resided with his master at Monghyr, and had no intention of returning home soon, it was held he dwelt at Monghyr and not at Nuddea[5] Whether persons imprisoned can be said to dwell at their homes or not depends on whether they have any intention of returning to their previous place of abode on the termination of their imprisonment[6] The decisions under the County Courts Act in England are to the same effect Thus, a man having his permanent residence at one place and a lodging at another for a temporary purpose only, was held not to dwell in the latter place[7] A mere visitor acquires no dwelling[8] A person who has no permanent place of abode "dwells" at the place at which he may be temporarily residing[9] Where the payee sued the maker of a note which was dated "Madras, 27th September, 1860" and delivered to plaintiff at Madras, it was held that this was *prima facie* evidence of dwelling within the High Court's jurisdiction[10]

Residing —In the present Act the word "dwell" has been replaced by "reside' What is meant by residing is a question of fact depending on the circumstances of each case The words "dwell" and "reside" express the same idea,[11] and the explanation shows that "reside' must be construed more liberally in this section than in s 37, cl (*a*) Act XIV of 1882 see (O III r 2)[12]

Guardian and Minor—Where a mother residing at Poona, the widow of a deceased European resident applied to be appointed guardian of her three minor children (two of whom were residing with her and the third, a girl of the age of sixteen years, was residing in England), and to have certain payments made to her out of the estate of their deceased father on their account, and to have certain powers over their persons given her, and to have the costs of the application paid

[1] Mayhew v Tulloch, (1872) 4 All , H C , 25

[2] Orde v Skinner, (1881) 3 All , 91 , L R , 7 I A , 196 , 7 C L R , 295

[3] Ganendra v Juttendra, (1873 4) L R , 1 I A , 387 , 14 B L R , 60

[4] Saminatha Pillay v Varisai Mahomed Ravattan, (1865) 2 Mad , H C., 301 , Madho Doss v Sita Ram, (1871) 3 All H C , 121

[5] Forgash Faray v Hachim (1867) 7 W R , 417 , see also Gendu v Govind, (1873) 10 Bom H C , 409 and Fatima v Sakina, (1876) 1 All , 51, in which it has been held that the fixed and permanent home of a man's wife and family and to which he has always the intention of returning constitutes his dwelling place

[6] Gopal Chunder Sircar v Kurnodhar Mookhee, (1867) 7 W R , 349

[7] Macdougall v Paterson, (1852) 21 L J (C P), 27

[8] Butler v Ablewhite (1860) 23 L J (C P) 292 , see cases collected in Adams v Great Western Railway Company 7 H and N , 404.

[9] Alexander v Jones (1866) L R 1 Exch , 133

[10] Winter v Round (1862 3) 1 Mad H C , 202 explained in Rajendra Rau v Sama Rau (1862 3) 1 Mad H C , 436

[11] Mahomed Shuffi v Laldin (1879) 3 Bom , 227 Shri Gosvami v. Shri Govardhan (1890) 14 Bom , 541 see also Everet v Frere, (1885) 8 Mad , 295

[12] Ramchandra v. Keshav, (1882) 6 Bom 100

confined, as if he had been imprisoned on conviction for a misdemeanour[1] The Sudder Dewany held, so far back as 1810 that a State prisoner was amenable to the jurisdiction of the Civil Court of the district in which he lived for a debt contracted in a foreign country[2] The Madras Court went further and exempted from jurisdiction persons compelled by the injurious act of others, to seek justice at the Presidency and persons visiting it on public business, provided they did not remain there for any other purpose[3]

Dwelling—*High Court's Charter*—Under their Charters the High Courts possess jurisdiction if the defendant at the time of suit dwells within the limits of their ordinary jurisdiction A person having a permanent residence outside Calcutta, who visits Calcutta for the purpose of carrying on a suit, does not dwell in Calcutta In *Emritlall v Kidd*,[4] Levinge, J, said — I consider that the word 'dwell' has a more extended signification than the word 'reside' and means a permanent as opposed to a mere temporary residence A traveller, putting up at an hotel may be said in one sense to reside there, but a man can only be said to dwell, in the sense in which that term is used as giving jurisdiction in the place where he ordinarily and permanently resides' So where the "defendant, an officer in the Bombay Staff Corps, holding an appointment in Sind visited T plaint was filed against him, the *temporary* residence for meaning of the Charter"[5] T a person, has a permanent dwelling he does not "dwell' in the sense used in the Charter at a place where he has lodged for a temporary purpose, but it is otherwise if he has no permanent dwelling So where defendant had usually a house at Mussoorie from March to October, where he left his wife and children while he attended race meetings in the plains and visited Calcutta in March merely temporarily, and for the purposes of pleasure, it was held he was liable to answer in a suit filed during his stay in Calcutta, that he could not be said to dwell at Mussoorie as he never lived there during the winter months, and though he kept an establishment there for his children, yet, at the time the suit was instituted he had no house of his own[6] A party spending his time alternately in the mofussil and Calcutta, and resident in the latter for some days previous to and on the day of filing the plaint is, for the purpose of jurisdiction, said to dwell in Calcutta[7].

The same meaning has been attached to the word 'dwell' in other Acts Thus, where an officer attached to a regiment at Shahjehanpore, who had been gazetted to two year's furlough, was served with process whilst attending a race meeting at Meerut, it was held that if he had not availed himself of furlough, but was only present on leave at Meerut, he was not dwelling within the jurisdiction of the Meerut Small Cause Court *Semble*, if having availed himself of furlough, he retained his permanent residence at Shahjehanpore and only visited Meerut for a few days But, if having availed himself of furlough and having retained no permanent place of residence at Shahjehanpore or elsewhere, he attended the race meeting with the intention of leaving after the

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[1] Caliprasad Dutt v Prankissen Haldar, 1 Mor, 370

[2] Dwarka Das v Raja Jhoolal, (1792 1811) 1 S D A Rep, 306

[3] Nagapah Chetty v Pachummah 1 Str 159, 1 Mor, 370, Boojung Row v Chittoo Row, 1 Str, 210, 1 Mor, 370

[4] Emritloll v Kidd, (1864) 2 Hyde, 117

broker for a commission received from the purchasers In *Corbett v General Steam Navigation Company*,[1] and in *Minor v London and N W R Company*,[2] it was held that the defendants in those cases did not carry on business within the meaning of the County Courts Act at a place where they employed *general* agents to act on their behalf, and in the present case I think Narayana is the only person who can be said to have carried on business with the meaning of the section in question with respect to the paddy sent to him for sale For these reasons, I am of opinion that the Court has no jurisdiction to entertain the suit"

It has been held that the test of carrying on business as a retail dealer is "sale," and that a retail dealer in European goods, residing and carrying on business at an up country station, is not within the jurisdiction of the High Court [illegible] for the purpose [illegible],[3] and that an [illegible] mploying a firm [illegible] ies on business at a place by a commission agent, to whom he only consigns goods, does not carry on business within the local limits of a Court where the commission agent resides,[5] and generally, that it could not be intended that a person residing at a distant place, and there carrying on his business in person, might, because of his carrying on business within local limits by a gomashta, clerk or agent, or because of occasional visits only, be sued in the High Court at the discretion of the plaintiff, without any regard to the place where the cause of action arose[6] It will be seen, however, on comparing this case with that of *Chinnammal* cited above, that Scotland, C J, somewhat modified his opinion, and it is settled in Madras that it is not necessary for jurisdiction that a person should *personally* carry on business[7] In addition to actual inhabitancy, the Supreme Court had jurisdiction by constructive inhabitancy on the ground of trading The decisions on this point will be found in Morton's Reports Morley's Digest, and 3 Moore's Indian Appeals Carrying on business by factors was not sufficient to ground that jurisdiction[8] A person who has no regular office, but comes once or twice a week from the mofussil to a friend's house in Calcutta, and sees people there on business, and contracts with B in Calcutta for the hire of cargo boats, carries on business in Calcutta,[9] and so does the Captain of a foreign ship trading to this port[10]

Zemindari business is not business of the kind contemplated in this section,[11] nor is the receipt of presents or offerings[12] The expression 'carry on business" is intended to relate to business in which a man may contract debts and ought to be liable to be sued by persons having business transactions with him[13]

Personally works for gain —These words were inserted to give the Courts jurisdiction over persons who, though dwelling out of the local limits

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[1] 4 Hurl and Nor 482, (1859) 28 L J, Ex 214

[2] 1 C B N S, 325 Followed in Chundee Charn v Eduljee, (1882) 8 Calc, 678

[3] Framji Kavasji v Hormasji (1862) 1 Bom H C, 220

[4] Khimji Chaturbhuj v Forbes (1871) 8 Bom H C, 102 and see Kessowji v Khimji (1888) 12 Bom 507

[5] Goopee Mohun v Protap Chunder, (1869) 11 W R 53)

[6] Subbaraya v Government (1862 3) 1 Mad H C, 286
Muthaya v Allan (1882) 4 Mad 200 compare Chundee Churn v Eduljee, (1882) 8 Calc 678 nor in Bombay when the defendant is a British subject—Kessowji v Khimji (1888) 12 Bom, 507

[7] Sunker Doss v Manickram, Fulton, 334

[8] Greesh Chunder Bonnerjee v Collins, (1864) 2 Hyde 79

[10] Queen v Judges of Small Causes Court, 2 Taylor and Bell, 7 See also O V r 13.

[11] *Anonymous*, (1875) 3 W R, 223,

[12] Shri Goswami v Shri Govardhan (1890) 14 Bom, 541, p 553

[13] Goswami Shri v. Shri Govardhanlalji, (1894) 18 Bom, 294

out of the shares of the said three minor children in the hands of the Administrator General of Bombay the Bombay High Court made the order applied for [1]

Partnership—A suit to wind up a partnership may be brought in the Court within whose jurisdiction the defendants reside, notwithstanding the provisions of the Contract Act, s 265 [2]

Rent—A suit by a lessor against his lessee to recover rent which had accured due in respect of agricultural land situated in Gwalior, the plaintiff being a subject of the Gwalior State, but the defendant a British subject resident in the district of Jhansi is properly brought in a Civil Court in the district of Jhansi [3]

Insolvency—By 11 and 12 Vict c 21 s 5 jurisdiction in insolvency is conferred when the person ' shall reside within the jurisdiction ' of any of the High Courts A petitioner came down from Cawnpore where he resided for some time and left his wife to file his petition which he did after living eight days in a hotel It was held that the petitioner had come to file his petition and not to reside (though he had stated that he intended to remain in Calcutta after his discharge) and that the Court had not jurisdiction [4] And where a person whose family residence in Bhagulpore had been sold in execution of a decree, left *his family in that district, and coming to Calcutta lived in a hired house from* May till September when he left to obtain funds to carry on a petition of insolvency which he had filed in July he was held not to reside within jurisdiction, although he returned in November and lived as before [5] In *Hurruck Chund Golicha, in re*,[6] an insolvent was held to ' *reside* in Calcutta, who carried on business there by means of a gomashta [7] But the residence contemplated by s 5 of the Insolvent Act need not be permanent residence Its object is to extend the benefit of the Act to *bona fide* residents for the time being within the jurisdiction of the Court at the time they filed their petitions [8]

Carry on business—In the case of *Chinnamal Tulukanna tumal*,[9] it was decided that a trader in the mofussil who habitually sent grain to Madras to be sold by a party who was a general agent for the sale of goods sent to him by different persons did not carry on business within the jurisdiction of the High Court although he himself had sometimes accompanied the loads Scotland C J, said —" It could not have been intended as observed in the judgment of the Court in *Subbaraya Mudali v Government*[10] that the words ' carry on business were to be understood in their most general sense Giving proper effect to the other words of the provision, the section, I think, requires that the defendant should, at the time of the commencement of the suit, carry on, within the local limits of the Court's jurisdiction, some independent regular business in person, as in the case of *Mitchell v Hender*,[11] or at an office or other fixed place of business,[12] either personally or by *clerks or servants employed by the defendant and conducting the business under his control and in his individual or partnership name* Here the defendant had no place of business in Madras and the sales were effected by Narayana in his independent trade or business of a general

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[1] Meakin, *in re*, (1897) 21 Bom, 137

[2] Ramasami v Theruvengadasami, (1876) 1 Mad, 340

[3] Bhujbal v Nanheju, (1897) 19 All, 450

[4] Tietkins, in the matter of, (1868) 1 B L R, O C, 84, see also Manning v Manning, (1869 72) L R, 2 P, and D, 223

[5] Ram Paul Singh *in re*, (1881) 8 C L R, 14.

[6] Hurruck Chund Golicha *in re* (1880) 5 Calc, 605

[7] See Kessowji v Khimji (1888) 12 Bom, 507

[8] DeMomet, in the matter of, (1894) 21 Calc, 634

[9] (1866 7) 3 Mad H C., 146

[10] (1862 3) 1 Mad H C 286

[11] (1854) 23 L J Q B, 273

[12] See Rolfe v Leermonth, 14 Q B, 196

of 1882

18 (*1*) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction

Place of institution of suit where local limits of jurisdiction of Courts are uncertain

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction

(*2*) Where a statement has not been recorded under sub section (*1*), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and unless there has been a consequent failure of justice

Act XIV of 1882, s 16 A This section applies to H C and Prov S C C

Failure of justice The addition of the last line to this section still further restricts technical objections to jurisdiction made on appeal and the section is now imperative, no objection *shall* be allowed unless there has been failure of justice

Under Act XIV of 1882 it was held that a suit for rent of a fishery was a suit for immoveable property within the meaning of the words of this section A suit for rent of a fishery was brought in a certain Court and there was reasonable ground of uncertainty as to the jurisdiction of that Court to entertain the suit On an objection that the suit ought to fail for want of jurisdiction held that the conditions required by s 16A (Act XIV of 1882) had been satisfied, and that the objection as to jurisdiction ought not to be entertained [3]

19 Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally

Suits for compensation for wrongs to person or moveables

[1] Khetter Mohun Dass v Chundra Money, Coryton 120
[2] Ashruf Hossein v Lazarus S D N W, 1861 p 588
[3] Shibu Haldar v Gopi Sundari Dasya (1897) 24 Calc, 449, 2 Calc. W. N, 109

works for gain within the local limits of the jurisdiction of another Court the suit may be instituted at the option of the plaintiff in either of the said Courts

Illustrations

(a) A residing in Delhi beats B in Calcutta B may sue A either in Calcutta or in Delhi

(b) A residing in Delhi publishes in Calcutta statements defamatory of B B may sue A either in Calcutta or in Delhi

Act XIV of 188 Sec 18 This section applies to H C and [illegible] to S C C

Other suits to be instituted where defendants reside or cause of action arises

20 Subject to the limitations aforesaid every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant or each of the defendants where there are more than one at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain or

(b) any of the defendants where there are more than one at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain provided that in such case either the leave of the Court is given or the defendants who do not reside or carry on business or personally work for gain as aforesaid acquiesce in such institution or

(c) the cause of action wholly or in part arises

Explanation I—Where a person has a permanent dwelling at one place and also a temporary residence at another place he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence

Explanation II—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office at such place

Illustrations

(a) A is a tradesman in Calcutta B carries on business in Delhi B by his agent in Calcutta buys goods of A and requests A to deliver them to the East Indian Railway Company A delivers the goods accordingly in Calcutta

—— , P

A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business

(*b*) A resides at Simla, B at Calcutta and C at Delhi A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non resident defendant objects, the suit cannot proceed without the leave of the Court

Act XIV of 1882, sect 17. This section applies to Pro. S. C C., and to the H C, but not in its original civil jurisdiction, clause 120 Illustration (*a*) is taken from Winter *v* Way,[1] and illustration (*b*), from *DeSouza v Coles*[2]

Cause of Action —For the meaning of these words we may turn to the English cases [3] where we find that they are held to comprise every fact which it is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse [4] It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved in order to obtain judgment [5]

In *Chand Kour v. Partab Singh*,[6] it has been said by Lord Watson that "the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff It refers entirely to the grounds, set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in favour ' "Relief is not synonymous with cause of action, that term including all the relief covered by the facts on the strength of which a plaintiff comes into Court".[7]

Explanation III of Sec 17, Act XIV of 1882 defined "cause of action" in contract cases, and declared it to arise in the place where the contract was made, in the place of performance or completion of performance, or in the place where the money was expressly or impliedly payable All these places are included in the present section by the addition of the words "or in part arises" to sub clause (*c*)

The following decisions under Act XIV of 1882 may be of service in construing this clause —

Where a partnership business had been carried on at Agra and Rutlam, and a balance was struck in the books at Agra, it was held that the cause of action arose at Agra [8]

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[1] Winter *v* Way, (1862 3) 1 Mad H C, 200

[2] De Souza *v* Coles, (1867) 3 Mad H C, 397

[3] That the expression "cause of action," when used in Act XIV of 1882 has the same meaning as is attributed to it in the English decisions has been laid down in Murti *v* Bhola Ram, (1894) 16 All 165, Salimi *v* Muhammad, (1896) [illegible] (1903) 25 All 48, and Ram [illegible], and see also Haramoni *v* [illegible] *v* Sooradhonee, (1863 7) [illegible] 1889) 12 Mad 136

[4] Cooke *v* Gill, (1872 3) L R 8 C P p 116, and Deep Narain Singh *v* Dietert (1904) 31 Calc p 281, 8 Calc W N, 207 where this definition was followed.

[5] Read *v* Brown, (1889) L R, 22 Q B D, at p 131 C A

[6] Chand Kour *v* Partab Singh, (1887 8) L R, 15 I A, 156, 16 Calc, 98 See also Shankar Baksh *v*. Daya Shankar, (1887 8) L R 15 I A, 66; 15 Calc., 422

[7] Sarsuti *v*. Kunj Behari Lal, (1883) 5 All, 345

[8] Luckmeo Chand *v* Zorawar Mun, (1859 61) 8 Moo I A 291. See Orde *v*. Skinner, (1878) 7 I A, 196, 3 All, 91

A gave B at Midnapur a cheque on a Calcutta firm in favour of C C paid B at Purulia and presented the cheque in Calcutta where it was dishonored C's suit against A was held to be properly instituted at Purulia [1]

To constitute a cause of action there must be an infraction of a right [2]

arrangement is made subsequent to the contract to pay there [5] The plaintiff was a member of a family which had the management and received the income of certain property situate in British India belonging to a temple situate at Ashti in the Nizam's territory Part of the income was devoted to religious service and part to the support of the family The plaintiff sued to recover by partition his share of the income and for an injunction restraining the defendant from interfering with the plaintiff in celebrating religious worship at the time when his turn came to officiate The defendant (his brother) resided at Ashti *Held* that the right to share in the income followed the devolution of the office and that the Court could not grant the relief sought for as the Courts in British India could not execute their decree by putting the plaintiff in possession of his office, when his turn came to officiate at the temple, which was outside British India [6] Where certain plaintiffs claimed possession of separate portions of land situated in two districts on the same title against the same defendants alleging a dispossession on one day from part of the property claimed in district A and from the whole in district B and on another day from the rest of the property in district A *held*, that the plaintiff could bring one suit for the recovery of the whole property in both districts and that such suit was properly brought in a Court in district A [7] Where property lost in one district is found in another a suit to recover possession must be brought in the district in which it is found [8]

Conjugal rights—The cause of action in a suit by a husband for restitution of conjugal rights consists in the wife absenting herself from her husband's house without his consent, and it must therefore be deemed to arise at his house [9]

Divorce—Under s 2 of Indian Divorce Act (IV of 1869) a District Court has jurisdiction to make a decree for dissolution of marriage upon being satisfied that the adultery charged has been committed in India, without going into evidence as to the place of the marriage of the parties [10]

Dower debt—A suit for the recovery of a dower debt from the assets of a deceased Mahomedan being a suit on a contract, is subject to the provisions as to jurisdiction contained in s 17 (Act XIV of 1882), [11] and when it was held to be well instituted in the place where the marriage took place although the defendant worked and resided elsewhere [12]

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1 Sitaram v Thompson (1905) 32 Calc, 884
2 Nurdin v Alavudin (1889) 12 Mad, 134
3 Dadabhai v Saldanha, (1894) 18 Bom 43
4 Uma v. Dwarka, (1905) 1 Calc L J, 219
5 Seshagri v Nawab Askur (1907) 30 Mad 438
6 Trimbak v Lakshman (1896) 20 Bom 495
7 Har Chandra v Lal Bahadur (1894) 16 All. 359
8 Ram Pertap v Bholabutty (1865) 9 W R 586
9 Lalitagar v Suraj (1895) 19 Bom 316
10 Kyte v Kyte (1896) 20 Bom 362
11 Shankar Dial v Muhammad Mujtaba (1896) 18 All, 400
12 Zamiran v Fateh Ali (1905) 32 Calc, 146

Joinder—The right to join in one suit two causes of action against a defendant cannot be exercised, unless the Court to which the plaint is presented has jurisdiction over both causes of action [1]

Legacy—A suit for a legacy must be brought, not within the jurisdiction where the legatee resides, but within the jurisdiction where the heir resides [2]

Probate—Under s 56 of Act V of 1881, a District Judge has jurisdiction to grant probate of a will executed out of British India by a person who is not a British subject, if the testator had at the time of his death moveable or immoveable property within the jurisdiction of the Judge The discretion vested in a Judge by s 56 does not extend to a case where there is no Court of concurrent jurisdiction in India to which application for probate can be made [3]

Minor Removed—See Sarat Chander *v* Forman [4]

Rent suits, Bengal—See Act VIII of 1885, s 144 (1) A suit for recovery of rent due on a tenure for a sum not exceeding Rs 1,000 is cognizable in a Munsiff's Court, although a suit for recovery of possession of the tenure lies in a Subordinate Judge's Court, the capital value of the tenure being Rs 4 000 [5]

Domicile in Native State.—Defendant No 1 who was domiciled in the native state of Cochin obtained from the Resident a certificate to collect the debts of the deceased *karnavan* of the plaintiff's *tarwad* The plaintiff, whose domicile was the same as that of defendant No 1, sued in British Cochin for a declaration of his right to receive the interest accrued due on certain Government promissory notes, being the property of his deceased *karnavan* *Held*, that the suit did not lie and that the appellant should either have es ... t in the Court of native Cochin and then ... or have brought his action against the ... dant No 1 as a party to such action [6] ... the agent of each member within the meaning of this section [7] British Courts are empowered to pass judgment against a non resident foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment [8] In *Murugasa Chetti* v *Annamalai Chetti*,[9] it was argued that no foreigner is subject to jurisdiction except by residence or domicile and that the Indian Legislature had no power to legislate in conflict with this rule of international law The point was further raised before their lordships of the Privy Council, when this case went before them on appeal but was not decided by their lordships [10]

Plaintiff has right to select Court.—Where a suit may be filed in more than one of several Courts, it is a general principle of law that the plaintiff may select the *forum* in which to bring the suit Where a plaintiff sued in a District Munsiff's Court having jurisdiction at the place where the money due under a contract was to be paid, there being no Small Cause Court having jurisdiction at such place, *held*, that the jurisdiction of the district Munsiff was not ousted by the fact that there was in existence at the date of the suit a Small Cause Court having jurisdiction at the place where the contract was made [11]

[1] Khimji v Purushotam (1884) 7 Mad , 171

[2] Ashutosh v Hareechuran, (1871) 16 W R , 305

[3] Bhaurau v Lakshmibai, (1896) 20 Bom , 607

[4] Sarat Chundar v Forman, (1890) 12 All , 213

[5] Fazlur Rahim v Dwarka Nath, (1903) 7 Calc W N 402 30 Calc , 433

[6] Ammunni v Krishna (1893) 16 Mad , 405

[7] Annamalai v Murugasa (1902 3) L R 30 I A , 220 , 26 Mad , 544 , 7 Calc. W N , 754

[8] Ramibhat v Sankar Baswant, (1901) 25 Bom 528

[9] Murugasa Chetti v Annamalai Chetti (1900) 23 Mad., 458

[10] Annamalai v Murugasa *supra* , followed in Tadepalli v Syed Mir Ghulam, (1906) 29 Mad., 69 239

[11] Ratnagiri v Vava Ravuthan, (1896) 19 Mad., 477

Onus of proof —When the defendant is not within jurisdiction, plaintiff must show that, at the time of the commencement of the suit, the defendant actually and voluntarily resided or carried on business, or personally worked for gain, within the jurisdiction [1]

Acquiescence —If the defendants who do not reside within the local jurisdiction do not apply under s 20, (Act XIV of 1882) they will be held to have acquiesced [2]

High Court This section does not apply to the Original Side of the High Court, (see sec 120) which is governed by its Charter, and under it the words "cause of action" mean the whole cause of action and not a material part of it Thus in a case on contract, it includes both the contract and the breach [3] If however, only part of the cause of action arises within the jurisdiction then the suit can be brought on the Original Side of the High Court, if leave has been first obtained [4]

Leave An order granting leave is not a mere formal order regulating procedure but is a condition precedent to jurisdiction and from it an appeal lies It is not a ministerial act [5] Leave should be distinctly sought and obtained and should not be inferred from the fact that the plaintiff has been allowed to sue as a pauper [6] Leave cannot be granted under the Charter after the institution of the suit, and as it relates only to the cause of action disclosed in the plaint it cannot confer jurisdiction in respect of a substantially different cause of action, and the plaint cannot be amended as in an ordinary case [7] But it has been recently held in Bombay that leave under this section [sect 17 (c) of Act XIV of 1882] was good though subsequent to institution [8]

Suit by representative —Although it has been said that to give the Court jurisdiction all things which go to constitute the cause of action must occur within jurisdiction, yet this must be taken subject to the explanation that there [illegible] f

[illegible]

the deceased person arose [9]

Foreign decree —Suit brought in Bombay on an order of the Court of Chancery directing contributors to pay within four days of service on the *order* on them Order served in Bombay on defendant who lived without jurisdiction *Held*, service of the order was not necessary to complete the cause of action, and no part of it having arisen within the jurisdiction of the High Court, the suit would not lie [10]

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[1] Modhu Soodun v Cochrane, (1880) 6 C L R, 417

[2] Viraragava v Krishnasami, (1883) 6 Mad, 344 at p 349, compare Babaji v Lakshmibai, (1885) 9 Bom, 266

[3] Rampurtab v Premsukh, (1891) 15 Bom 93, and see the cases cited in Kalidhan v Shib Nath, (1882) 8 Calc, 483

[4] [illegible] Secretary of State [illegible] Bom 23, but see [illegible], 375, as regards [illegible] Company, (1897) [illegible], as regards Bombay

[5] D Souza v Coles, (1866 7) 3 Mad, H C, 384, Hadjee Ismail v Hadjee Mahommed, (1874) 13 B L R, 91

[6] Jairam v Atmaram, (1880) 4 Bom, 482

[7] Rampurtob v Premsukh, (1891) 15 Bom, 93, Hadjee Ismail v Hadjee Mahommed, (1874) 13 B L R, 91

[8] Narayan v Secretary of State (1906) 30 Bom, 570, 8 Bom, L R, 543

[9] Ladd v Parbutty Dassee, 2 Hyde, 18

[10] London Bank v Badee Bibee, (1881) 5 Bom, 42 See also, Sieveking v Focke, (1863) 9 W R., 215

Libel.—See Geffert *v* Ruckchand [1]

Hoondees, Promissory Notes, Bonds—In an action to recover *money paid in Calcutta* on *hoondees* drawn by defendant beyond the local limits, but sent by him to Calcutta and there accepted and paid by the plaintiff, it was held that the whole cause of action arose within Calcutta [2] So where a resident in the Upper Provinces sent cotton to A in Calcutta for sale, and drew *hoondees* against it payable in Calcutta and the *hoondees* were first negotiated and then accepted and paid by A's *gomashta* in Calcutta, in a suit by A not on the *hoondees* but for *a balance of account*, it was held that as the bills were made payable in Calcutta and presented there, the liability arose from the implied contract to repay the money, and the whole cause of action arose in Calcutta [3]

The High Court has jurisdiction in a suit on a promissory note, if the note is [illegible]

[illegible]

stipulation in the document is general, and no particular place of payment has been named [7] In this case the Judge decided, following *Wilde v Sheridan*,[8] that if the contract had not been made in Madras, the High Court would not have jurisdiction But in a later case, it has been held that in the absence of any stipulation in the contract itself, the intention of the parties must guide the Court in determining the place of performance [9] Where plaintiff sued on a promissory note executed beyond, but payable in Calcutta, leave to sue not having been obtained before the institution of the suit, it was held that the High Court had no jurisdiction,[10] but where after settlement, an oral agreement to pay in Bombay was entered into and leave was obtained *held*, the Court had jurisdiction [11] Sanction to sue must be obtained in a suit to recover from a person residing and carrying on business outside of Calcutta goods pledged with him, which have been obtained from the plaintiff by means of an offence or fraud, the offence or fraud alone having occurred within the jurisdiction [12]

Decree Fraud—A suit to set aside a consent decree of the High Court, on the ground of fraud may be brought without previous leave to sue having been obtained though all the defendants dwell without the jurisdiction [13] The Original side of the High Court has jurisdiction to entertain a suit to set aside on the ground of fraud a decree passed by any other Court of concurrent jurisdiction, where the cause of action has arisen either wholly

[1] (1889) 13 Bom, 178

[2] Joan Mull *v* Muanoo Lall, (1866) 1 Ind, J (N S) 219

[3] Dhanraj *v* Gobindram, (1868) 1 B L R, 76

[4] Ramgopal *v* Blaquiere, (1868) 1 B L R, 35

[5] Isser Chandra Sein *v* D Cruz (1866) 1 Ind J (N S) 233

[6] Winter *v* Round, (1862 3) 1 Mad H C, 202, referred to Minakshi *v* Mylo (1905) 28 Mad, 19.

[7] Rajendra Rau *v* Sama Rau, (1862 3) 1 Mad H C, 433, following Rex *v* Danser 6 T R, 242

[8] Wilde *v* Sheridan, 21 L J Q B, 260

[9] Dhunjisha *v* Fforde, (1887) 11 Bom, 649, see also Darragh *v* Purshotam (1882) 4 Mad, 372

[10] Mothoormohun Roy *v* Jadoomoney Dassee (1872) 10 B L R, 122, Hurjidan Das *v* Bhagwan Das (1871) 7 B L R 102 535

[11] [illegible]agdas *v* Dowlatram, (1887) 11 Bom, 257

[12] [illegible]k Churn *v* Gopalkisto (1878) 3 Calc, 264

[13] [illegible] Abdool Aziz, (1879) 4 C. L. R, 366

or, in case the leave of the Court has been first obtained, in part, within the local limits of its ordinary original civil jurisdiction [1]

Goods sold —In a suit for goods sold and delivered, where the defendant does not dwell within the local limits of the High Court, the cause of action *i e*, the sale of delivery of the goods, must have taken place within those limits Thus, where A sued B for goods, sold in Madras and sent partly by sea ... local ... or ... iot

... licious prose ... against him ... issued by the ... it was held ... of the cause ... f the Court, to bring an action in the High Court

Partnership—Plaintiffs, living at Madras, entered into a contract with defendant, residing at Bimlipatam, the terms of which were that defendant should be entitled to half a share in any of the shipments made by him at Bimlipatam on his electing to take the risk Defendant elected at Bimlipatam In a suit brought for losses sustained, it was held that the High Court had no jurisdiction [4] So, when an agreement in writing was signed by the plaintiff and defendant ... partnership in a tannery ... to be ...

once in every eight days, it was held that the cause of action did not arise within local limits [5]

Setting aside a deed —Plaintiff, a resident in Calcutta, sued H, a resident in Bombay, but carrying on business by his *gomashta* in Calcutta, and others resident in Bombay, to set aside a release executed in Calcutta of his interest in certain property situated in Bombay, on the allegation that it had been obtained from him on misrepresentations made by H *held*, that the cause of action included the effect of the release on the property in Bombay and did not wholly arise in Calcutta [6]

Letters of administration —A District Judge cannot grant letters of administration, if the deceased had not at the time of his death a fixed place of abode or any property within his district [7]

Extra-territorial jurisdiction —As to cases in which the cause of action arise below low water mark, and within three miles of it, see *Baban Mayacha v Nagu* [8]

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[1] Nunda Lal Bose *v* Nistarini Dassee, (1903) 7 Calc W N, 353

[2] Winter *v* Way, (1862 3) 1 Mad H C, 200, otherwise if they had been sent at the risk of the defendant—DeSouza *v* Coles, (1866) 3 Mad H. C, 384, pp 405 6

[3] Ludly *v* Johnson, (1870) 6 B L R, 141 See Musa Takub *v* Manilal, (1905) 29 Bom, 368, 7 Bom L. R, 29

[4] DeSouza *v*. Coles, (1866) 3 Mad H. C, 384

[5] Bavah Meah *v* Khajo Meah, (1868) 4 Mad H C, 218

[6] Hadjee Ismail *v*. Hadjee Mahomed, (1873) 13 B L R, 91

[7] Fardunji Aspandiarji *v* Navajabai, (1893) 17 Bom, 689

[8] (1878) 2 Bom, 19

21 No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice

Objections to jurisdiction

This section excludes all belated objections as to the place of suing In any case, appellate and revisional Courts are now prohibited from allowing objections on this score unless there has been a failure of justice consequent on the case having been heard in a Court which lacked jurisdiction to try it

22 Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed

Power to transfer suits which may be instituted in more than one Court

Act XIV of 188?, Sections 20 and 2? This section applies to H C

This section embodies in more convenient form the provisions of section 22

Notice — Notice must be given to the other parties [1] so that if one defendant only applies he is bound to serve the other defendant with notice, and where an application is made by one of several defendants without notice having been given to the defendants who do not apply the application should be allowed to stand over till notice is given The denial of an application made by one defendant prejudices the right of another defendant, subsequently served with summons to make a similar application An objection in the written statement is enough [3]

Foreign Court —The Courts in India cannot stay proceedings because the costs in a previous litigation in a foreign Court have not been paid [4]

Justice is more likely to be done —Geffert v Rukchand [5]

23 (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court an application under section 22 shall be made to the Appellate Court

To what Court application lies

98?

Bom L R, 281

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate

Act XIV of 1882 sections 23 and 24 This section applies to H C The sub sections (2) & (3) do not apply to the Jhansi division

See the case of *Skinner v Orde*[1]

Under the old practice applications of this nature to a High Court were submitted through the District Court but this has been advisedly altered by the compilers of this Code

General power of transfer and withdrawal

24 (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

(a) transfer any suit appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn

(2) Where any suit or proceeding has been transferred or withdrawn under sub section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall for purposes of such suit, be deemed to be a Court of Small Causes

[1] Skinner v Orde (1878 80) 2 All 241 L R 6 I A, 126

Act XIV of 1882, sec 25 This section applies to H C ...

In this section are restated the provisions of ... with one or two additions

At any Stage —These words set at rest the ... point and make it clear that a suit may be transferred even ... part heard

Where a part heard case is transferred it cannot be ... evidence taken in the first Court[1] But see Order XVIII, ... for this very case, and Sub section 2 above

Retransfer —This seems to be a new provision as under the old ... District Judge, at any rate in the North West could not ... transferred to his own file[2]

Competent —This word is now fully defined for the purposes of ... section as meaning "having jurisdiction both as regards the subject matter and the value of the suit"[5]

Jurisdiction —If the Court of first instance has no jurisdiction to hear the suit, this defect is not cured by transferring the case to another Court having jurisdiction,[6] and no order of transfer should be made[7] unless by consent of parties[8] and the consent must be such that the Court will infer that the defendant did, in point of fact, waive all objections and engage that the case should be tried on its merits by the second Court[9] So if the High Court transfers to ...

... by the latter Court An application on the ground of want of jurisdiction ... decree and the order for sale ...

Notice Quære whether a valid transfer can be made *on the application of a party* without notice to the other parties to the suit In a Madras case it was held that want of notice under Act XIV of 1882, sec 25 did not render the transfer void[12]

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2 Amir Begum v Prahlad Das (1902) 24 All 304 Nandan Prasad v ... 12 (1902) 24 All 356 but see Gappa Lal v Mathura Das (1903) 25 All 18; Ramcharitar Ray v Pulkata Ray (1900) 10 Calc W N 902

5 Fitna v Abdul Majid (1892) 14 All 31 Sita Ram v Nauni (1899) 21 All 230 But he may have inherent jurisdiction to make such an order in ... 611

... 395 Krishna Velji v Plan...

... Ledgard v Bull (1885 6) ... Ikoran (1890) 13 Mad 211

... edgard v Bull *supra* (1885 6) ... (1883) 7 Bom 487

... 9 All 191

10 ... 39

11 ... 871

12 ... — As to the applications of a ...

The High Court has refused to transfer a case from a Court which had jurisdiction to try it, where no application had been made to the Judge of the latter Court nor any notice given to the plaintiff [1]

High Court—The 13th section of the Letters Patent (1865) of the High Court at Fort William gives the Court power to order a suit to be transferred for trial, only where the transfer is agreed on by the parties, or for the purposes of justice, and in the absence of agreement it must be made out that there will be inconvenience amounting to this—that if the case be tried in the Court in which it was originally tried, the trial will be unsatisfactory

A suit may be transferred on the ground of expedition and cheapness,[2] or for convenience and to save expense,[3] or by consent of parties [4]

The mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred,[5] but where on a motion to transfer, it appeared that the parties and witnesses resided in Calcutta that it would be cheaper to try the suit there and that the parties appearing on the motion consented, a transfer was ordered [6]

Where it appeared that questions of English law were involved in the case, that the witnesses were chiefly British subjects, and the plaintiff was an officer of the High Court and resident in Calcutta the Court ordered the case to be transferred for trial to the High Court, original jurisdiction [7] It may be necessary for the purposes of justice that a suit should be transferred [8]

It is no objection to the trial of a case transferred under this section that the transfer order was founded on a misconception [9] Under this section the Calcutta High Court transferred a case from the Presidency Court of Small Causes to the Court of the senior subordinate Judge of Dacca [10]

[illegible] of Act XIV of 1882 was [illegible] insolvency proceedings [illegible] creditor [11] And they [illegible]

Subordinate Court—The corresponding section of Act XIV of 1882 did not enable a District Judge to transfer a suit pending before himself to a Subordinate Court,[12] but still he was competent to transfer the execution of a decree which had been passed by his own Court to the file of the Subordinate Judge for disposal [13]

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next friend when no guardian *ad litem* has been appointed see Jotendronauth v Rajkristo, (1889) 16 Calc 771

[1] Kristo Dass Koondoo v Issur Chunder (1869) 11 W R 189

[2] Jotendronauth v Raj Kristo, (1889) 16 Calc 771

[3] Harendra Lall v Survamangala (1897) 24 Calc, 183, see also Khatija Bibi v Tarak Chunder, (1883) 9 Calc 980

[4] Payn v Administrator General of Bengal, (1880) 5 Calc, 766

[5] Ojooderam Khan v Nobinmonee Dossee, (1866) 1 Ind Jur, N S, 396,

[6] Payne v Administrator General (1880) 5 Calc, 766, and see Jotendronauth v Raj Kristo, (1889) 16 Calc, 771

[7] Doucett v Wise, (1866) 1 Ind Jur N S, 227, but see Courjon v Courjon, (1871 2) 9 B L R, 10

[8] Kapil Nauth v Government, (1872) 10 B L R, 168.

[9] Ram Bux v Girdharee Lall, (1866) 1 Agra, 178

[10] Kadambini v Madan Mohan, (1898 9) 3 Calc W N, 247

[11] Nassarvanji v Kharsedji (1898) 22 Bom 778 Balaji v Ramchoddas, (1881) 5 Bom, 680 See also Krishna Velji v Bhan Mansaram (1894) 18 Bom, 61

[12] Sakharam v Gangaram, (1889) 13 Bom, 654

[13] Bishenmun v Land Mortgage Bank (1884 5) L R, 12 I A, p 11, 11 Calc, 244 A District Judge could transfer a probate case for trial to a Subordinate Judge under cl (d) sub sec. 2, s 23 of Act VII of 1887—Kunjo Behari v Hem Chandra, (1898) 25 Calc, 340

"a Court of Small Causes" in
nd strictly so called, and does
of a Court of Small Causes [1]
urt suit tried by a Subordinate
Judge invested with Small Cause Court jurisdiction, even if tried in accordance with the regular procedure [2]

Practice —This applies to cases of winding up companies under Act VI of 1882 [3] As to the power of a village Munsif trying a case under Reg, IV of 1816, to transfer, see the case of *Lakshmakka* v *Bali* [4]

Punjab—Commissioners and Deputy Commissioners may exercise the powers of a District Court, and these may be delegated to Subordinate Judges, Act XVIII of 1884 ss 34 & 38

Burmah—In lower Burmah, a Divisional Court may exercise, as regards the Courts under its control, the same powers of withdrawal, trial and transfer as are conferred by s 24 on a District Court see s, 31 (1), Act VI of 1900 As to powers of transfer, see s 31 (1) to (4)

Central Provinces—Similar powers are conferred on a Divisional Court in the Central Provinces by s 18 (1), Act II of 1904

Power of Governor General in Council to transfer suit

25 (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor General in Council, who may, by notification in the Gazette of India, transfer such suit, appeal or proceeding to any other High Court

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case

This section refers to H C

This is an entirely new section and proceeds on the analogy of section 527 of the Code of Criminal Procedure, Act V of 1898

INSTITUTION OF SUITS

Institution of suits

26 Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed

Act XIV of 1882 sec 48

This section applies to H C and Prov S C C

[1] Ramchandra v Ganesh (1899) 23 Bom, 382 But see Mangal Sen v Rup Chand (1891) 13 All 324

[2] Shankarbhai v Somabhai (1901) 25 Bom 417 As to the *Punjab*, see s 34 (2) Act XVIII of 1884 As to the *Central Provinces*, see s 18 (2) Act II of 1904 and as to *Burmah* s 31 (3) Act VI of 1900

[3] West Hopetown Tea Co (1887) 9 All, 180

[4] Lakshmakka v Bali, (1885) 8 Mad, 500

The provisions relating to the institution of suits, the issue and service of summons, the appearance of parties, and the hearing of suits have been in the main relegated to the Rules in the first appendix to this Code The essential provisions only find a place in sections 26 to 35

Plaint essential to a suit—A "plaint" in law means "a private memorial tendered to a Court in which the person sets forth his cause of action, the exhibition of an action in writing It does not necessarily mean "a plaint duly stamped"[1]

A suit must commence with a plaint and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot on that ground alone be deemed to be a suit, if it has not commenced with a plaint Such a proceeding *e g* a proceeding in execution is in strictness only a proceeding in a suit

As to time and manner and place of presentation see Order IV, *post*

Such other manner as may be prescribed—That is prescribed by Rules made under this Code Order IV, rule 1 directs that every suit shall be instituted by presenting a plaint, so that unless and until some other mode of institution is introduced a plaint will remain essential to every suit

Summons and Discovery

27 Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed

Summons to defendant

Act XIV of 1882 sect 64 This section applies to H C and Prov S C C

Duly instituted—That is by the presentation of a plaint, see section 26

In manner prescribed—By the rules in schedule 1 hereto Order V deals with the issue and service of summons and the rulings on this subject are collected in the commentary to the rules of that order see *Vol II*

28 (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province

Service of summons where defendant resides in another province

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto

Act XIV of 1882, section 85 This section applies to H C and Prov S C C.

This section re states the provisions of Section 85, Act XIV of 1882, and provides that the receiving Court shall serve the summons according to its own rules and return it together with a record of its proceedings in respect thereof Order V, r 21 provides for the despatch of such summons by post and the cases decided under the old Code are collected in the commentary to that rule

[1] Assan v Pathumma (1899) 22 Mad, 495, per Subramania Ayyar, J

[2] Venkata Chandrappa v Venkatarama, (1899) 22 Mad, 258 See "Suit," p. 7, *ante*.

29 Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts;

Service of foreign summonses

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor General in Council,[1] or that the Governor General in Council has, by notification in the Gazette of India, declared the provisions of this section to apply to such Courts [2]

Act XIV of 1882 Section 650 A

30 Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

Power to order discovery and the like

(*a*) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence

(*b*) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid,

(*c*) order any fact to be proved by affidavit

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[1] For lists of such Courts see notification No 1361 I dated 29th March 1889 and No 2179 I dated 2nd July 1890 printed at pp 693 to 695 of the Southern India (Hyderabad) Volume of Macpherson's British Enactments in force in Native States ed 1899

For notification declaring the section applicable to Courts in Ceylon see No 433 J dated 23rd March 1899 Gazette of India 1899 Pt I p 188

This section has been applied to Courts in certain Native States in Southern India (viz Gazette of India 1901 Pt I p 58? ibid 190? Pt I p 1?) and to the High Court of Travancore (ibid p 9?)—Note Legislative Department

[2] For lists of Courts to which this section has been applied see notifications No 868 I dated 13th March 1885 No 1?7 I dated 20th May 1885 No [illegible] 1890 and Gazette of India 1890 Pt I p 181 and 1893 Pt I p 1033, respectively—Note Legislative Department

31 The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects

Summons to witness

32 The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may,—

(*a*) issue a warrant for his arrest,

(*b*) attach and sell his property,

(*c*) impose a fine upon him not exceeding five hundred rupees,

(*d*) order him to furnish security for his appearance and in default commit him to the civil prison

These three sections apply to H C and Prov S C C, they are inserted to give sanction to the rules relating to these subjects which have been embodied in Orders XI—XIII XVI and XIX post

JUDGMENT AND DECREE

33 The Court, after the case has been heard shall pronounce judgment, and on such judgment a decree shall follow

Judgment and decree

Act XIV of 1882 s 198 This applies to Prov S C C but not to the [illegible] Commissioner, Jurisdiction—s [illegible] ontier Province

The case has been heard —*The language of sections 198, Act XIV of 1882 has been modified, but we have it clearly enacted in the body of this Code that judgment can only be pronounced after due hearing A decree for dissolution of marriage cannot be made merely on admission and without recording evidence [1] The recorded impression in the mind of a Judge based on partial evidence while the suit was remanded has been held in India not to be a judgment [2]*

Decree shall follow —*This inadvertent omission from Act XIV of 1882 has here been remedied [3] This section prepares the way for Order XX, where the provisions governing judgments and decrees are collected*

INTEREST

34 (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal

Interest

[1] Bai Kaiku v Shiva Toja (1893) 17 Bom, 624

[2] Buloram v Issur Chandra (1875) 23 W R, 77

[3] Ranjit Singh v Ilahi Baksh (1887) 5 All., 526.

sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of pay ment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie

Act XIV of 1882 Sect 209 This section applies to H C, and Prov S C C

Payment of money —Under the corresponding and other sections of Act XIV of 1882, a conflict of decisions occurred on the construction of these words and a recent Madras judgment went so far as to declare that a mere decree for sale was a decree for the payment of money within the meaning of these sections [1]

In the first draft of this section it was made clear that the mortgage decrees" were not intended by the compilers of the Code to be covered by its provisions In the final draft those additional words were again struck out and the section is now substantially the same as sect 209 of the former Code But the Select Committee stated that their object in omitting the express words of the first draft was to make it clear that a decree for the payment of money does not include a decree for sale in enforcement of a mortgage or charge [3] It applies however to all other decrees even though they give reliefs other than an order for the payment of money by the judgment debtor

Agreed rate —The rate of interest agreed upon must be awarded up to date of suit[4] even if it is compound[5] unless on the ground of fraud [6] or uncon

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[1] Vaidhinalasamy v Somasundram (190) 28 Mad 473 See section 73 *post*, Payment of money

[2] Interest in such decrees is provided for by sect 86 Transfer of Property Act IV of 1882

[3] See Report of Second Select Committee

[4] Act XXVIII of 1855 s 2 Mangniram v Dhowtal (1886) 12 Calc 569, with regard to mortgage it has been said that the Courts cannot cut down the

...

Usufructuary mortgage —A mortgage who is entitled to possession in lieu of interest and who does not take possession loses his right to interest—Mohadaji v Joti (1893) 17 Bom 4?

[5] Bandaru v Atchayamma (1878 81) 3 Mad 125 Ganga Pershad v Land Mortgage Bank (1894) L R 21 I A 1 21 Calc 366, Land Mortgage Bank v Soorjo Prokash (1876) 25 W R 323 Alu Prasad v Sukhan, (1881 81) 3 All 610 Tejpal v Kesri Singh (1879 80) 2 All, 621, Mathura Prasad v Durjan Singh (1879) 2 All 633 Beni Prosad v Pewat Lall, (1873) 24 Calc 740 p 750 Appa Rao v Surya Narayna (1889) 10 Mad

scionable terms [1] But it has never been definitely laid down that the Court should *always* allow interest at the mortgage rate up to date of actual realization of decretal money [2]

Penalty—Simple or compound interest at a high rate is not in itself a penalty [3] An agreement for enhanced interest from date of default is not a penalty,[4] unless coupled with compound interest,[5] although no figure is named, such sum is at once ascertainable,[6] unless the bond does not provide for interest except on default [7]

Stipulations in contracts substituting a higher for a lower rate of interest even from the date of the bond cannot be treated as penalties, but must be interpreted—as other parts of a written contract should be interpreted—according to the expressed intentions of the parties [8] There is, therefore, a conflict of ... Allahabad High Courts on the one hand, and ... urts on the other, on this question The ... ave further ruled that notwithstanding the ... it is open to a Court to decide whether a ... date of default was agreed on as interest ... fendant is entitled to equitable relief [9] A

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[1] Kamini Soondari v Kali Prosanno, (1884 5) L R, 12 I A, 215, 12 Calc, 225 (loan by mukhtar to pardahnashin lady)

[2] Rani S Koer v Rai Sham Krishnen, (1907) 11 Calc, W N, 249, Kuar ...

(1887) 9 All, 74

[4] Prayag Kapri v Shyam Lal, (1904) 31 Calc, 138 See also Umesh Chandra v Gopal Lal, (1904) 31 Calc 233

[5] ... (1883) 9 Calc ... Din Narain v Dipan, (1886) 8 All, ...

Bom, 200

[6] D... (1886) 8 All ... Anna Rau v S... Narayana ...

[8] Baidnath Das v Shamanand Das, (1895) 22 Calc, 143

[9] A ...

N, 10..

[8] Narayansami v Narayana Rau, (1894) 17 Mad, 62, Banke Bahari v Sundar Lal, (1893) 15 All, 232

[9] Pa ...

provision in a bond that on default interest at 24 *p c p a*, should be charged from the date of the bond is a penalty and cannot be recovered [1]

A condition in a decree payable by instalments that in default of payment of any two instalments, the whole amount due and *increased* interest should be at once recoverable is not a penalty [2]

Interest greater than prin[illegible]
the principal cannot be reco[illegible]
in Bombay,[4] or in Calcutta,[5]
the parties is not a Hindu [7]
Act for the repeal of the Us[illegible]
Act (IX of 1872),[9] or by the
bond purporting to be executed in adjustment of a past debt, the principal for the purpose of the rate of *dimdupat* is the amount of such bond and not the balance of the unpai[illegible]
rule does not apply
has assigned his rigl[illegible]
was a Mahomedan,
rights to a Hindu [14] The rule is applicable even if the interest be payable in gra n,[15] and the rule applies to mortgages where no account of rents and profits has to be taken [16] The rule of *dimdupat* is not applicable, if it was not appli[illegible]

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tion by way of penalt[illegible]
penalty is to be awa[illegible]
appended an explanat[illegible]
est from the date of
See Ar damalai Chetty *v* Veeral adiam Chetty (1903) 26 Mad 111

[1] Trimlak Tukaram *v* Bhag Chand (1903) 27 Bom 21 For a case in which compound interest was disallowed as unconscionable see Kripa Ram *v* Sami ud din (1903) 25 All 284

[2] Run Bahadoor *v* Rai Narain (1880) 7 C L R 82 And see Backaraya *v*

[illegible]

[3] Kakarlapudi *v* Uppalapadi (1862) 1 Mad H C 5

[4] Ganpat *v* Adarji (1879) 3 Bom 312

[5] Nobin *v* Romesh (1887) 14 Calc 781

[6] Nanchand *v* Bapusaheb (1879) 3 Bom 131 Dawood *v* Vullabh Das (1894) 18 Bom 227 Digambar *v* Ramchandra (1896) 20 Bom 611 Shankar *v* Mukta (1898) 22 Bom 513

[7] Wooma Churn *v* Sreehari Nath (1896) 1 Calc W N clxxviii

[8] Ram Lal *v* Haran Chandra (1869) 3 B L R O C 130 12 W R O C, 9, Hamka Manji *v* Memun Ayab (1870) 7 Bom H C 19 Khusal Chand *v* Ibrahim (1866) 3 Bom A C 23 Kedar *v* Atmaram bhat (1865) 3 Bom A C 11 p 18 Ramcoomar *v* Jawahir Lall (1880) 5 Calc 867 Nobin Chunder *v* Romesh Chunder (1887) 14 Calc 781

[9] [illegible]

[10] [illegible]

[11] [illegible]

[12] [illegible]

[13] [illegible]

[14] [illegible]

[15] [illegible]

[16] Balkrishna *v* Hari (1891) 15 Bom 84 see also Umes Chunder *v* Zahur (1890) [illegible]

[illegible] (1873) 6 All H C 339

cable at the time when the decree became final [1] When the rule of *damdupat* has been once applied in any account directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest not only for the period of 6 months allowed for redemption, but also subsequently without limitation of time [2] The operation of the rule of *damdupat* is excluded in all mortgages, the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be [3]

After suit—In an ordinary suit for money, the rate of interest after plaint and before decree is in the discretion of the Court, whether there is a stipulated rate [illegible] but if the suit is for fore closu[illegible] e stipulated rate should be given [illegible] of the Court,[5] unless in a suit [illegible] rate must be given up to decree [7]

After decree—Interest, if not given in the decree, is taken to have been refused—para 2, *supra* After the decree the contract ceases, becomes merged in the decree, and the plaintiff recovers only such interest as according to the course and practice of the Court is allowed on debts for which the creditor has the security of its decree [8] Interest on the amount decreed, namely, principal, interest and costs, cannot be objected to on the ground that it is compound interest [9] Interest not mentioned in the decree cannot be given by the executing Court [10]

When a decree does not specify the rate of interest, the decree holder is only entitled to interest at the usual Court rate [11]

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1 Lall Behary *v* Thacomoney (1896) 23 Calc 899, Kanaye Lall *v* Anund Lall, (1896) 23 Calc 903, note Bhuggoban Chunder *v* Pran Coomaree, (1896) 23 Calc, 906, note

2 Ram Kanye *v* Cally Churn (1894) 21 Calc, 840 See also Ramchandra *v* Bhimrav Ravji (1876) 1 Bom, 577

3 Gopal Ramchandra *v* Gangaram Anandshet, (1896) 20 Bom 721—(overruling Ganesh Dharani Dhar *v* Keshavrav (1891) 15 Bom, 625 Where, under the terms of a mortgage there is a liability to account, the rule of *damdupat* does not apply The law as laid down in *Gopal v Gangaram* is not limited only to cases in which at date of suit an account between mortgagor and mortgagee must be kept The discretionary powers conferred on the Courts [illegible]

4 Mangniram *v* Dhowtal Roy, (1886) 12 Calc, 569

5 Carvalho *v* Nurbibi, (1879) 3 Bom, 202

6 Dhaudbhai *v* Dhaudbhai, (1890) 14 Bom., 113

7 Bandaru *v* Atchayamma, (1879) 3 Mad, 125; Ramachandra *v* Devu, (1889) 12 Mad, 485 See on this point, Umes Chunder *v* Zahur, (1889 90) L. R, 17 I A, 201; 18 Calc., 164

8 Rashessur Surmah *v* Kalekanath, (1869) 11 W R, 455

9 Jodoonath Roy *v* Dwarkanath, (1861) 1 W R, Mis, 15 See on this point Fewings, ex parte, 25 C D, 338

10 L[illegible] and *v* Ram Narain, (1872) 17 W R, 19; [illegible] Mahomed Yakoob *v* Mahomed, (1874) 22 [illegible]

11 Soobudra *v* Sheo Churn, (1867) 7 W. R, 375, Abdoollah *v* Reasut Hossein, (1872) 17 W R., 414, Lalunmani *v* Behari Lall, (1871) 7 B L R, App, 30

Mercantile usage.—Where there is no express agreement to pay interest, it may be awarded if there is any such mercantile usage, such as 9 per cent. on all book debts in Bombay;[1] otherwise in Calcutta.[2] In the absence of proof of usage, a mortgagee is not entitled to interest for the day on which the money is advanced as also for the day on which the money was repaid.[3]

Interest after due date, no contract.—When a rate of interest is not stipulated for till realization, but to a certain date, if the money is not paid on the fixed day, the principal and interest become from that time a debt, which, when recovered by process of law, may, in the discretion of the Court, be made the subject of an additional penalty for the breach within six years;[4] but there is no implied contract for the continuance of the same rate of interest.[5] The interest after due date proceeds upon the breach of contract;[6] and should be treated as a question of damages.[7] There is no distinction on this point between an ordinary bond and a mortgage.[8] If the debtor has continued to pay the same rate of interest after due date, this will be evidence in support of holding [illegible] fered by the creditor;[9] but if [illegible] orbitant, the Court should only [illegible] which the money has become [illegible] ntract rate of interest after the date for redemption fixed by the decree.[11] The best guide to discretion is to be found in s. 86 of Act IV of 1882 which requires Courts to decree mortgage debts with interest at the rate provided in the mortgage (if to that rate no valid legal

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1 Ram Lal v. Dulab Das, Perry's O. C., 220; (1849-51) 5 Moo. I. A., 136.

2 Joy Narain v. Kashee Chowdhury, (1871) 16 W. R., 148; Juggomohun Ghose v. Kaisreechund, (1861-3) 9 Moo. I. A., 260. See however, Juggomohun v. Manickchund, (1857-60) 7 Moo. I. A., 268, as to the nature of the evidence sufficient to prove mercantile usage. Interest runs on *hoondees* drawn at 112 days sight in Moorshidabad—Dhunput Singh v. Jugut Indur, (1865) 4 W. R., 85.

3 Raghub Prusti v. Bhobut Sahoo, (1903-4) 8 Calc. W. N., 216.

4 G[illegible] amajit Tewari v. Durga [illegible]

5 Deen Doyal Lall v. Het Narain Singh, (1877) 2 Calc., 41.

6 Bishen Dayal v. Udit, (1884) 8 All., 486.

7 Juala Prasad v. Khuman Singh, (1878) 2 All., 617; Mansab Ali v. Gulab Chand, (1886) 10 All., 85; Tara Chand v. Nafar Ali, (1877-8) 1 C. L. R., 236; Bishen Dayal v. Udit, (1886) 8 All., 486.

8 Niwas Ram v. Udit Narain, (1891) 13 All., 330. As to the case of vendor and purchaser, see Ghousiah v. Rustumjih, (1890) 13 Mad., 158.

9 Mohamed Hossein v. Tuqueeroodeen, (1871) 15 W. R., 284.

10 M[illegible]

11 Sam[illegible]

cable at the time when the decree became final [1] When the rule of *damdupat* has been once applied in any account directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest not only for the period of 6 months allowed for redemption, but also subsequently without limitation of time [2] The operation of the rule of *damdupat* is excluded in all mortgages, the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be [3]

After suit —In an ordinary suit for money, the rate of interest after plaint and before decree is in the discretion of the Court, whether there is a stipulated rate or if the suit is for foreclosure ulated rate should be given,[4] Court ,[5] unless in a suit to must be given up to decree [7]

After decree —Interest, if not given in the decree, is taken to have been refused—para 2, *supra* After the decree the contract ceases, becomes merged in the decree, and the plaintiff recovers only such interest as according to the course and practice of the Court is allowed on debts for which the creditor has the security of its decree [8] Interest on the amount decreed, namely, principal, interest and costs, cannot be objected to on the ground that it is compound interest [9] Interest not mentioned in the decree cannot be given by the executing Court [10]

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[1] Lall Behary v Thacomoney (1896) 23 Calc 899 Kanaye Lall v Anund Lall, (1896) 23 Calc 904 note Bhuggoban Chunder v Pran Coomaree (1896) 23 Calc , 906, note

[2] Ram Kanye v Cally Churn (1894) 21 Calc 840 See also Ramchandra v Bhimrav Ravji (1876) 1 Bom , 577

[3] Gopal Ramchandra v Gangaram Anandshet (1896) 20 Bom 721—(overruling Ganesh Dharam Dhai v Keshavrav (1891) 15 Bom 625 Where under the terms of a mortgage there is a liability to account the rule of *damdupat* does not apply The law as laid down in Gopal v Gangaram is not limited only to cases in which at date of suit an account between mortgagor and

[4] Mangniram v Dhowtal Roy, (1886) 12 Calc , 569

[5] Carvalho v Nurbibi, (1879) 3 Bom , 202

[6] Dhaudbhai v Dhaudbhai, (1890) 14 Bom , 113

[7] Bandaru v Atchayamma, (1879) 3 Mad , 125 , Ramachandra v Devu, (1889) 12 Mad , 495 See on this point, Umes Chunder v Zahur, (1889 90) L R , 17 I A , 201 , 18 Calc , 164

[8] Rashessur Surmah v Kalekanath, (1869) 11 W R , 455

[9] Jodoonath Roy v Dwarkanath, (1864) 1 W R , Mis , 15 See on this point Fewings, ex parte, 25 C D , 338

[10] Leelanund v Joy Mungal, (1871) 15 W R , 335 , Leelanund v Ram Narain, (1871) 15 W R., 415 , Nubo Kishore v Anund Mohun, (1872) 17 W R., 19 , Jewan Lall v Doorga Dutt, (1873) 20 W R , 477 , Mahomed Yakoob v Muhamed Zahooral, (1874) 22 W R , 533 , Enayet Ali v Mahomed, (1874) 22 W R , 534.

[11] Soolodra v Sheo Churn, (1867) 7 W R , 375 ; Abdoollah v. Reasut Hossein, (1872) 17 W R , 414 , Lalunmani v Behari Lall, (1871) 7 B. L R , App , 30

A summons is a demand within the section[1] and where no previous demand has been made, interest can only be given from the date of the suit[2] and then the amount is within the discretion of the Judge [3]

Interest when reasonable —Interest has been allowed when the plaintiff has been opposed in following a sum in execution,[4] or deprived of money actually making interest,[5] to a mortgagee on account of putni rents paid by him,[6] from a mortgagee retaining possession after payment,[7] and on the surplus proceeds in his hands when he has sold under a power of sale[8] but not from an agent retaining money not demanded [9] Interest has been allowed on rents exacted contrary to a decree,[10] on money ordered to be deposited and no deposit made, from the date of order,[11] on the interest of Government promissory notes improperly retained,[12] and even if no mention is made of interest in the document, yet if the parties have treated the same as bearing interest, the party who has paid it may be estopped from denying it is due [13] On the other hand, if a person is entitled to interest under a decree, he does not lose it by agreeing to take payment in instalments,[14] and wher[illegible] at 5 per cent, and A subsequently ve[illegible] voluntarily debited himself at 8 per ce[illegible] could not be enforced, as the agreement [illegible]

Payment tender —An offer of part payment will not stop interest[16] nor will a payment into Court by way of security until final decision, which cannot be withdrawn by the plaintiff,[17] nor will a tender of a portion without payment into Court [18]

Interpretation —A note of hand promised repayment with interest at 5 per cent without either stating whether it was per mensem or per annum, *held*, the ambiguity might be explained by previous transactions between the parties and by custom [19]

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[1] Alison *ex parte* L R, (1872 3) 15 Eq, 394

[2] Patsahee Dobain v Hurdeo Narain, (1870) 24 W R, 437, Surendra Kumar v Kunja Behary, (1900) 27 Calc, 814 4 Calc W N 818, Kamalammal v Peeru Meera (1897) 20 Mad, 481, see also Abdool Kureem v Meah Jan, (1866) 6 W R 288

[3] Mangniram v Dhowtal, (1886) 12 Calc, 569, and see 'AFTER SUIT, p 158, *supra*

[4] Parbutty Churn Soor v Promothonath Ghose, W R, (1864) p 174

[5] Miller v Barlow, (1871 2) 14 Moo I A, 233

[6] Brojonauth Singh v Bhagobutty Dassee, (1864) 1 W R, 133

[7] Esree Singh v Sheo Sahoy, S D, N W (1864) p 438

[8] Abdul Rahman v Noor Mahomed, (1892) 16 Bom, 141

[9] Turner v Burkinshaw, (1866 7) L R, 2 Ch App, 488

[10] Tara Monee v Mackintosh, (1868) 9 W R, 272

[11] Ramdass v Prosunno Moyee, (1871) 16 W R, 297

[12] Taracknath Mookerjee v Gouree Churn, (1865) 3 W R,, 147

[13] Gunga Phul v Gopal Oopadhya (1864) 1 W R 136

[14] Mohanund Mojoomdar v Purtap Chunder (1866) 6 W R Mis 121

[15] Guthrie v Lister (1866 7) 11 Moo I A 129 6 W R P C 59 But see Sheo Golam v Bani Prosad (1879) 4 C L R 29

[16] Kunhya Singh v Tooydun Singh, (1867) 7 W R 20

[17] Barrow's case L R, 4 Ch App 784 for the present law see Order XXIV rr 1 4

[18] Abdul Rahman v Noor Mahomed (1892) 16 Bom 141 Chunder Kant v Judoo Nath (1877 8) 1 C L R 470 As to what is a sufficient tender to stop interest after decree see Administrator General v Mirza Ahmed, (1883) 9 Calc, 33, and Jagat v Nahagapat (1907) 5 Calc L J 270

[19] Mahomed Sumsooddeen v Abdool Huq W R, (1864) p 379

A ' e to pay intere rceible in law [1] enhanced rate [1]

Rent—The purchaser of a tenure sold in execution of a decree for arrears of rent is not liable to pay interest at the rate stated in the *kabuliat* executed by the defaulting tenant but at the rate mentioned in s 67 of the Bengal Tenancy Act [2] By law Act VIII of 1885 arrears of rent were liable to interest at 12 per cent from the end of the year and the rate has been changed to 12½ p c by Act I of 1907 Sec 67 The right to interest is not lost by not claiming it for broken periods [4] or for a series of years [5]

Interest disallowed—Interest has not been allowed on a bond specially registered unless it expressly states that it carries interest after the due date it is to be enforced as a decree [6] nor can t be realised from a defaulting purchaser under the former Code on the difference between the first and second purchase moneys [7] nor is it allowed on money deposited under a decree subsequently reversed where the suit is not improper or vexatious [8]

Interest specified in the rules of a company registered under Act X of 1866, but not contracted by the borrower [9] or interest when offered for payment into Court [10] or when the decretal amount had been deposited in Court which accepted and retained it as a payment on account [11] was not allowed but the decree holder should have notice of the deposit [12]

Court fee duty—No additional Court fee is required on account of the claim for interest until payment It stands on the same footing as future mesne profits [13]

COSTS

35 (*1*) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court and the Court shall have full power to determine by whom or out of what property and to what extent

Costs

[1] Matungini v Makrura (1900 1) 5 Calc W N 438 overruling Basanta Coomar v Promoth Nath (1899) 26 Calc 130 3 Calc W N 36

[2] *Ahsanoollah v Kajee Aftaboo ldeen (18 9) 4 Calc 94* Doyamoyee v Bholanath, B L R Sup Vol, 592 but see *contra*—Raj Mohun v Anund Chunder (1868) 10 W R 166

[3] Alim v Satis Chandra (1897) 24 Calc 37 Kali Nath v Trailokhya (1899) 26 Calc 315 3 Calc W N 194 see also Administrator General of Bengal *v* Asraf Ali (1901) 28 Calc 227 and Ali Mamul *v* Bhagabati Debya (1897 8) 2 Calc W N, 595

[4] Rutty Kant Bose v Gungadhur Biswas (1862 4) W R F B, 13

[5] Johoory Lall v Bullab Lall (1880) 5 Calc, 102

[6] Kallooram *v* Doorganath (1868) 10 W R 175

[7] Soorj Buksh v Sreekishen (1888) 9 W P 500

[8] Ashruffunnissa v Khanum Jaun (1866) 6 W P 285

[9] Tipperah Loan Office v Gour Chandra (1878) 2 C L R, 349

[10] Gulli Jana Kayya v Garuda Reddi (1862 3) 1 Mad H C 124

[11] Pares Nath v Kisto Mohan (1869) 3 L L R App 105

[12] Kaleo Dass v Puran Koonaree, (1871) 16 W R, 304

[13] Vithal Hari v Govind Vasudeo (1893) 17 Bom, 41

such costs are to be paid, and to give all [illegible] for the purposes aforesaid The fact th[illegible] jurisdiction to try the suit shall be no bar [illegible] of such powers

(2) Where the Court directs that [illegible] follow the event, the Court shall state its [illegible]

(3) The Court may give interest on [illegible] not exceeding six per cent per annum and [illegible] shall be added to the costs and shall be [illegible]

This section applies to H C

In this Section the provisions of sections 218 [illegible] of sect 5 Judicature Act 1890 have been consolidated

Such conditions and limitations as may be prescribed [illegible] is by any separate legislative enactment or by the Rules [illegible] pursuance of Part X hereof The Rule Committees of the H[illegible] power under that part to make rules for any matters relating [illegible] examples of rule [illegible] O XXXIII, r [illegible] (admissions [illegible] dealing express [illegible] and *Order LXV* [illegible]

In the discretion of the Court —These words are taken fr[illegible] Act and replace the phrase any manner as the Court thinks fit

The discretion is very wide A Court may order the costs [illegible] the parties in definite proportions or order one party to pay [illegible] in lieu of taxed costs [1] and may even make a successful plaintiff [illegible] costs of the losing side [2]

The question whether costs are awarded under some general rule [illegible] other hand in the exercise of a discretion on particular facts is [illegible] no appeal lies in the latter case except by special leave obtained [illegible] Appellate Court [3]

Appeal for costs —Under Act XIV of 1882 an appeal for costs lay [illegible] a matter of principle was involved [4] So if the orders appealable [illegible] the jurisdiction of the Court or the merits of the case, an appeal lay [illegible]

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[1] Willmott v Barber (1881) 17 C D at p 774 Mayor of Bra[illegible] (1894) 3 Ch 53

[2] Harris v Letherick (1878 9) 4 Q B D 611 Fane v Lane (1879 80) [illegible] 228 see Annual Practice (1908) 1 906

[3] See Section 96 (3) post and cf Judicature Act 1873 sect 49 In [illegible] order as to costs will not be overruled unless the d s ret [illegible] [illegible] mistake as to facts Ro Gilbert (188[illegible] [illegible] K B 706 [illegible] will ass[illegible] at he has not [illegible] 511 Where th[illegible] on grounds not of [illegible] Service Society v [illegible]

[4] Secretary of State v Marjum Hosein (1885) 11 Calc 359 Mosl Ingan [illegible] Mozari (1886) 12 Calc 271 Bunwari Lall v Dinip Nath, (1886) 12 C[illegible]

part of the order which related to costs,[1] even though that portion of the appeal not referring to costs had been abandoned at the hearing[2] An appeal lay from an erroneous order as to costs made under a misapprehension as to fact and law[3] These cases are very much in a line with the English decisions referred to in note (3), p 163 *ante*, and may be taken as guides under this Code. See section 96 post

To be exercised judicially.—The discretion as to costs, although wide, is a judicial discretion, and must be exercised on fixed principles, and where a party successfully enforces a legal right and in no way misconducts himself, he is entitled to costs as of right,[4] and the Privy Council has laid down as a rule for the exercise of this discretion that a successful appellant is entitled to his costs[5]

The following cases in the Courts in India afford useful examples for the exercise of the discretion as to costs —

Costs given —A person wrongly made a party should get his costs,[6] and so should a party who has not opposed plaintiffs' claim,[7] or disclaims,[8] or has no interest in the suit, and has unnecessarily been made a party,[9] and would have suffered some injury if he had not appeared[10] And if a person is entitled to costs, he should not lose them on account of the mode in which counsel argues the case, or because counsel may claim more than he is entitled to[11] The admission of a defendant before suit that the money sued for is due to the plaintiff, is not a ground for depriving plaintiff of his costs[12] In a suit for damages for breach of contract and for recovery of earnest money, defendant was directed to pay costs of the suit, as she did not pay the earnest money into Court or formally tender it[13] The Government obtained their costs in the first Court, the opposite party appealed, not making the Government a respondent On appeal, the decree of the first Court was reversed *Held*, that the Government not having been made a party to the appeal, were entitled to recover their costs in the first Court[14] In a suit on a bond which stipulated for interest at two different rates, the defendant tendered what he considered sufficient compensation to the plaintiff before suit and claimed exemption from payment of interest and costs *Held*, that as the defendant had not tendered the amount stipulated for in the bond, the plaintiff was entitled to his costs[15]

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[1] Balkissen Dass v Luchmeeput, (1882) 8 Calc, 91, and see Kamat v Kamat, (1884) 8 Bom, 368, Carvalho v Nurbibi, (1884) 3 Bom., 202

[2] Vasudev v Bhavan (1892) 16 Bom, 241, see Huxley v West London, Ry, (1886) 17 Q B D 373 14 App Cas 26

[3] Ranchor[illegible] v Punamchand, (1898) 22 Bor[illegible] L. R, Sup vol., 496, 6 W[illegible] Oomachurn v. Grish Chunc[illegible]

[4] Cooper v Whittingham (1880) 15 C D 501, Civil Service Co op Society v General Steam Navigation Co (1903) 2 K B 756, and cases cited in Ann Prac (1908), O 65 r. 1

[5] Wilson, in re, 1 C D, 113, Kali Krishna v Secretary of State, L. R. (1887 8) 15 I A 186, 16 I A. 173

[6] Bishen Dyal v Bank of Upper India, (1891) 13 All, p 295

[7] Government v Sanoola (1865) 3 W R, 23

[8] Shunt Bhuksh v Nund Ram, (1869) 11 W R, 48

[9] Collector of Dacca v Kumala Kant Mookerjee, (1865) 2 W. R, 33.

[10] Collector of 24 Pergunnahs v. Wilkinson, (1869) 12 W. R, 444

[11] Moet v Pickering, (1878) 8 C D., 372

[12] Kuppuswami v. Zamindar of Kalahasti, (1904) 27 Mad, 341.

[13] Pitambar v Cassibai, (1887) 11 Bom, 272

[14] Government v Lalji Sahu, (1868) 1 B L R S. N. xxiii.

[15] Vengideswara v Chatu Achen, (1878 81) 3 Mad, 224.

A petitioner who had failed in his application on all points except the removal of the guardian was held entitled to his costs up to and including the order removing the guardian, as he was taken to have acted so far for the benefit of the minor [1]

Payment into Court—On the original side of the High Court when defendant pays into, and plaintiff draws money out of Court, the latter is entitled to costs incurred before the money was paid in [2] Where a defendant deposits rent in Court under s 61 of the Bengal Tenancy Act (VIII of 1885), and is found not to blame for the litigation, he is entitled to his costs [3]

General rule—The general rule is that, if a plaintiff recovers a less amount than he claimed in his plaint, his costs should be apportioned according to the amount recovered, and not to the sum claimed,[4] unless it appears that the plaintiff would be deprived of the benefit of the decree by reason of [illegible]

bring the suit [8]

No costs—But a party will not get costs, if by his conduct he has induced plaintiff to sue him,[9] or does not raise the defence on which he succeeds till special appeal,[10] or does not raise the plea of *res judicata* until after all the evidence had been taken [11] Where a party has acted with malice and malevolence, costs will not be allowed [12] And in a suit where plaintiff, after prolonged [illegible] was declared that the [illegible] erested on behalf of [illegible] ing or joined as par- [illegible] purchaser delayed in applying for a refund of the purchase money, on the setting aside of the sale, it was held that he should not be allowed any costs [15]

An applicant for letters of administration to the estate of a widow, having concealed the existence of claims of which he was aware, was ordered to pay the costs of the applications and of the caveats entered by some of the relatives of the deceased husband of the widow [16]

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[1] Faksruddin Mahomed, in the matter of, (1899) 26 Calc, 133

[2] Ardesir Limji v Sorabji, (1862 5) 1 Bom H C, 70

[3] Stalkartt v Guru Das, (1894) 21 Calc, 680

[4] Mudhun Mohun v Gokul, (1863 6) 10 Moo I A 563, Velu Pillai v Ghose Mahamed (1894) 17 Mad, 296, see also Bykuntnath v Mohessuree, (186?) 4 W R, Mis, 9

[5] Ram Chunder v Mariott, (1871) 15 W R 463

[6] Sheo Dyal Tewaree v Bishonath (1868) 9 W R, 61 Shib Pershad v Gunga Monee, (1871) 16 W R, 291, but see Heera Ram v Ashruf Ali, (1868) 9 W R, 103 and Harender Kishore v Administrator General of Bengal, (1886) 12 Calc, 357

[7] Monohur v Romanath Law, (1878) 3 Calc, 484

[8] Watson & Co v Hurgobind (1874) 22 W R 35

[9] Sreenath v Goluck (1871) 15 W R, 348

[10] Nobeen Kishen v Shib Pershad, (1867) 7 W R 490

[11] Run Bahadoor v Lucho Koer (1881) 6 Calc, 406 and see Aukhil Chunder v Moheenee Mohun (1879) 4 C L R 491

[12] Kalee Pershad v Ram Pershad (1872) 18 W R, 14

[13] Moseehun v Munoorun (1875) 24 W R, 69

[14] Sajedur Raj v Baidya Nath Deb (1896) 1 Calc W N, 65

[15] Girdhari v Sital Prasad, (1889) 11 All, 372

[16] Jaikisandas v Harkisen Das, (1878) 2 Bom, 9

Costs are not allowed where the parties contend for much more than they are entitled [1] or the appellant has failed in part of his appeal,[2] or has used forged documents,[3] nor are the costs incurred by the introduction of irrelevant matter given [4] nor should the respondent, if he has been guilty of fraud, get costs [5] And where on appeal the decision appealed from was upheld on different grounds from those relied on by the lower Court, the appeal was dismissed without costs [6]

Where in a suit for an account, the defendant (agent), falsely denied his fiduciary position, he was ordered to pay the whole costs without regard to the result of the account [7]

Subject to the conditions and limitations aforesaid, see O XI, r 3 and O XXIV, r 4

Full power to give—Sections 123 and 379 old code Where under a mortgage security the mortgagor is not personally liable for the principal and interest he may still be made personally liable for costs [8] In a suit brought by the plaintiffs against defendants to restrain him from obstructing the plaintiffs' ancient windows and for damages the defendants paid Rs 200 into Court The Court found the plaintiffs windows to be ancient and the damages paid insufficient It, therefore ordered the defendant to pay all plaintiffs' costs up to the date of the payment of the Rs 200 and three fourths of their subsequent costs, while the plaintiffs were to pay one fourth of the defendants subsequent costs The defendants appealed *Held* that the Court had full discretion to apportion the costs and the appellate Court would not interfere [9]

By whom to be paid—A Court is bound to decide by which of the parties costs shall be borne it cannot declare that they shall be borne by the unsuccessful party in a suit to be subsequently instituted [10] In a suit brought against several parties, some admitted the debt and partnership, but others denied them, *held*, the defendants who disputed the claim, should pay the costs of those who admitted it [11]

The decree must direct by whom and in what proportion the costs should be paid Any omission to do so is not a mere clerical error and must be rectified by review [12]

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[1] Ram Kumar v Kali Kumar, (1885 6) L R 13 I A, 116 (1887) 14 Calc, 99

[2] Rajrup Koer v Abul Hossein (1879 80) L R, 7 I A, 240, 6 Calc, 394

[3] Rodeshwar v Manroop, (1885 6) L R, 13 I A, 31

[4] Tishenmun Singh v Land Mortgage Bank (1884 5) L R, 12 I A, 7 11 Calc, 244 Rajah of Pittipur v Rajah Row Buchi, (1884 5) L. R, 12 I A, 22

[5] Bhubaneshwri v Nilcomul (1884 5) L R, 12 I A 137, 12 Calc, 18

[6] Fischer v Kamala Naicker (1859 61) 8 Moo I A, 170, 3 W R, P C, 33 See also Murtunjoy Chuckerbutty v Cockrane (1863 8) 10 Moo I. A 229

[7] Hurrinath v Krishna Kumar (1887) 14 Calc, 147

[8] Rutnessur Sein v Jusoda (1887) 14 Calc, 185, Damodar Das v Budh Kuar, (1888) 10 All., 179

[9] Luxumon Nana Patil v Moroba Ram Crishna, (1897) 21 Bom., 502

[10] Kashee Chund [illegible] parties can [illegible] hold good [illegible] sel, Crown [illegible] (1870) 14 [illegible] Ojoodhya [illegible] e also Prankumari v Abinash, (1871) 9 [illegible] Metropolitan Rly, (1894) 1 Q B 606

[11] Juggut Chunder v Roop Chund (1881) 6 Calc, 811 See also Ram Chunder v Manik Chunder (1881) 7 Calc

[12] Ram Sahay v Pookhoo (1871) 15 W R., 414, provided the applicant has not delayed too long say 3½ years—Oodoy Tara v Jonab Ali (1872) 17 W R, 358

Administration Suits—The English rule is that trustees and executors are entitled to their costs out of the estate so long as they have not been guilty of misconduct, and until such misconduct has been shewn it does not lie within the discretion of the Court to deprive them of their costs [1] But where they act improperly or unreasonably, the Court may refuse to order payment of their costs out of the trust funds [2] The same principle seems to have been followed in India under Act XIV of 1882 in administration and similar suits relating to the disposal of a general fund or estate —

Construction of will—In suits to determine the construction of a will, when a reasonable doubt exists as to the meaning of the bequest or devise, costs are usually paid out of the residuary personal estate, [3] not so, when the construction of the will is not so difficult as to require the assistance of the Court, [4] or when the plaintiff sued to oust a person from possession of property and took the risk as to whether the Court would take his view of the construction of a will [5]

Official Liquidator—An unsuccessful application by an official liquidator to place certain shareholders in the list of contributories having been *bona fide* made in the liquidation of the company the Court ordered that the costs of each side should be paid as a first charge out of the estate [6]

The Official Assignee in entitled to his costs of appearing in an appeal against an order of adjudication [7]

Partition—The costs of a suit for partition as well as for effecting partition should be borne by each party [8]

Probate—The executor of a will had obtained probate thereof when the executor of a subsequent and inconsistent will applied for, and obtained probate of the second will *held*, that the executors of both wills were entitled to their costs to be paid out of the estate so far as the costs would not be covered by the estate, each party must bear his own costs [9] The appellant cited the respondent, the executor of a will, to prove his testator's will The division Court ordered the respondent to lodge the will in Court and take out probate, but directed that the applicant should pay half the costs On appeal held that the fund primarily liable to the costs of probate was the residuary estate and part of the residuary estate being as yet undistributed it should in the first instance be applied to this purpose and after that the appellant and respondent should contribute in equal shares [10] The High Court has full power to make an

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[1] See Re Love (1885) 29 C D 348 Ann Prac (1908) 923 Re Jones, (1897) 2 Ch 190

[2] The words no order as to costs have been held sufficient to disentitle a trustee to retain his costs out of the estate Re Hodgkinson (1895) 2 Ch 190 See also Re Weall 32 Ch D 674 Re Chapman 72 L T 66 Mackertich v Ribeiro (1885) 11 Calc 628

[3] Wilkinson 2 Lindgren (1869-70) L R 5 Ch App 570 Kristoromoni v Narendra Krishna (1888-9) L R 16 I A 29 p 43, 16 Calc 383, Tarachurn v Suresh Chunder (1888-9) L R 16 I A 166 p 174 17 Calc, 123 Indar Kunwar v Jaipal Kunwar (1888) 15 Calc 725

[4] Narayani Dasi v Administrator General of Bengal (1894) 21 Calc, 683

[5] Ramjewan Lal v Dul Koer (1897) 24 Calc 412 Consent order—Effect of, on costs—Malchus v Broughton (1886) 13 Calc 193

[6] West Hopetown Tea Company (1889) 11 All 349

[7] Haroon Mahomed in the matter of (1890) 14 Bom, 189
Administrator General —Amir Jan v Rivett Carnac (1886) 10 Bom, 350
Government Solicitor —See Azimulla v Secretary of State (1892) 15 Mad., 450 Mahammad Alimullah v Secretary of State (1894) 17 Mad, 162

[8] Samasundari v 9 Jardine Skinner & Co (1869) 3 B L R, App, 120, 12 W R 160

[9] Taramoni Dasi in the goods of (1898) 25 Calc, 553 See also Bechar Akha v DeCruz (1895) 19 Bom 770

[10] Dayabhai v Damodar Das, (1897) 21 Bom, 75

order for the awarding of costs in lower Courts in a proceeding for revocation of a probate[1] and the costs should be assessed as in a miscellaneous proceeding [2]

Redemption —Defendant in a redemption suit should get his costs unless he has refused the amount tendered, or misconducted himself in the course of the suit [3] as between attorney and client [4]

Representative —An estate and not the manager thereof is liable for the

of a party who could object to her taking out a certificate for that pergunnah, although she had not asked for a certificate for it [6] A suit for contribution will lie where one has paid more than his share of costs on a joint decree [7]

Trustees &c —Trustees executors and administrators are entitled to their costs out of, or charged upon the estate except in cases of vexatious conduct or where by their neglect or misconduct, they have occasioned the institution of the suit[8] and when a trustee acts unreasonably in delaying to join in a conveyance, he is liable to pay the costs of a suit brought against him for the purpose of compelling him to do his duty [9]

Divorce —As to the person who should bear the costs in suits for judicial separation and divorce cases, see [10] In a suit for a divorce instituted by a husband against his wife the Court has a discretion to make the husband pay the wife's costs already incurred and to give security for her future costs [11] The English law which makes the husband in divorce proceedings liable *prima facie* for the wife's costs except when she is possessed of sufficient separate property, does not apply to divorce proceeding between Mahomedans [12] In a case in which a husband obtained an order for dissolution of marriage and costs but no damages were asked for against the co respondent, costs were given against him as between attorney and client [13]

Follow the event —This means follow the result of the decision [14] And

suit follow the judgment [16]

[1] Protap Chandra v Kali Bhanjan (1899 1900) 4 Calc W N 600

[2] Garabini Dassi v Protap Chandra Shaha (1899 1900) 4 Calc W N 602

[3] Dhondo v Balkrishna (1884) 8 Bom 190

[4] Obhoy Churn v D bendro Nath (1881) 8 C L R 437

[6] Ram Kishore v Luckheo Dilea (1864) 1 W R Mis 1 contra—Pooley's Trustee v Whetham (1885) 28 C D 38 p 41

[6] Feda Hossein v Khajoorunnissa (1868) 9 W R 459

[7] Kisto Coomar v Anund Moyee (1867) 7 W R, 300

[8] Simpson v Bathurst, L R 5 Ch App 193, Chennell in re (1878) 8 C D 492, Wainwright ex parte (1881 2) 19 C D, 140 cited in O Kinealy's C P Code, 6th Ed

[9] Mackertich v Pebeiro (1885) 11 Calc 628

[10] Fowle v Fowle, (1879) 4 Calc 260 but see Natall v Natall (1886) 9 Mad. 12 Proby v Proby, (1880) 5 Calc, 357, Thomson v Thomson (1887) 14 Calc 580

[11] Mathew v Mathew (189 ...

Campbell (1884 5)

... v Forester (1883) 24 C D, 231

[14] ... v Campbell (1884 5) 14 Q B D 821 Abbott v Andrews, (1881 2) 8 Q B D 648 Myers v Defries (1879 80) 5 Ex D, 180

A suit was dismissed in the first Court as beyond jurisdiction On appeal, this decision was reversed and the plaint returned *held*, defendant was entitled to his costs in appeal to the High Court on that ground [1] If the appeal is dismissed, it is sufficient to deprive the respondent of his costs that the appeal was dismissed on a preliminary objection of which the appellant had not notice [2] If a party substantially succeeds, he is entitled to his costs, though he may not have got the precise form of relief he wanted [3] Costs of an appeal may be allowed, though costs in the original case may follow the event [4]

Costs in the cause —These words do not mean that costs will follow the event, but that those costs remain to be dealt with by the Court at the hearing [5]

Costs, how calculated – Where a case was remanded from the High Court with orders allowing plaintiff to amend on payment of all costs of the two first hearings, it was held that this order included the stamp for the plaint [6]

Pleader's fees —Pleader's fees must be calculated according to the rules, irrespective of any private arrangement between pleader and client [7]

Other costs —The amount is calculated on what the plaintiff claims from the defendant,[8] and when a suit contains several distinct claims against separate defendants, the amount of costs to be allowed to each depends on the claim against him,[9] but the rules do not provide for the case of persons having separate interests made defendants in order to perfect their title and consent to a decree, and the Court should only allow them a sum sufficient to cover the costs of their appearance [10] Where there is no rule as to costs and no express agreement, a pleader is only entitled to reasonable remuneration for his work and labour [11]

The costs which a defeated plaintiff should be required to pay are those necessarily incurred by the successful party costs cannot be deemed necessary, if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided [12]

One trustee of a charitable trust can have the bills for the costs of a suit relating thereto taxed and the High Court has jurisdiction to order taxation [13]

Separate costs —Where the interests of the parties are separate and distinct separate costs should be allowed to each,[14] thus, where one defendant pleaded that he had nothing to do with the property sued for and proved it conducting his defence by a separate pleader, he was allowed his costs,[15] and if

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1 Moshingan v Morari (1886) 12 Calc 271

2 Imtiaz Bano v Latafatunnissa (1889) 11 All, 328

3 Ghanasham v Moroba (1894) 18 Bom, 474

4 Mohendro Chundra Ganguli v Ashutosh Ganguli (1893) 20 Calc, 762

5 Templeton v Laurie (1901) 25 Bom 230

6 Madhub Chunder v Ram Lochun (1870) 14 W R 143
Attorney and client —For taxation of costs between attorney and client, see Ram Doyal v Ram Deo (1900) 27 Calc, 269 4 C W N, 208 Basanta Kumar v Kusum Kumar (1900) 4 Calc W N 767, Iswar Chandra v Iswar Chandra (1871) 9 B L R App 19, Ram Nath v Mutunginee (1873) 12 B L R 110

7 Umritonath Jha v Roghoonath (1866) 6 W R, Mis, 35 And see Ram Chandra v Bhagubai (1897) 21 Bom 42

8 Kasheenath Sein v Chunder Monee (1868) 9 W R 289

9 Rooddur Narain Roy v Coomar Narain (1870) 13 W R 320

10 Ramputty Kooer v Kalee Churn Singh (1870) 14 W R 94

11 Ameeroonnissa v Chapman (1866) 6 W R 103

12 Seeta Patta v Suryudamma (1895) 18 Mad 128

13 Jijibhoy v Byramji (1894) 18 Bom 189

14 Kossella Koer v Beharee (1869) 12 W R, 70

15 Ram Chunder v Mutty Lall (1869) 11 W R, 19

the defendants are Zamindar and patnidar, and the suit is for possession of land,[1] or the defendants have been charged with jointly misappropriating property,[2] separate costs should be allowed

Not given — But where the defence is common to all,[3] or their interests are the same, as if they are joint holders,[4] or if they are representatives of a mortgagee,[5] or if they are members of the same family, living in the same place, give the same answer, and the suit is for damages on account of their joint act,[6] or they are co sharers suing separately on a joint cause of action, and the actions were from the first tried together[7] only one set of costs should be awarded

In appeal — When an appellate Court decrees an appeal and gives costs of its own Court the costs of the first Court should be included in the decree,[8] and a decree for usual costs and interest means all costs which the successful party has incurred from the commencement of the suit until the date of the final decree with interest at (now) 6 per cent from the date of decree[9] When an appellate Court after setting aside the decree of the lower Court, remanded the case and the order as to costs provided costs will abide the result —*held*, if the result of the remand was entirely in favour of the successful party he was entitled, as a matter of course to the costs in question, even if the decree of the lower Court, after remand did not contain any such direction[10] When a decree under which costs have been recovered is set aside in appeal, an express order is not needed for a refund of the costs with interest[11] The assignee of a decree who is made a respondent

Limitation —An order for costs made in the High Court on appeal is barred after three years[15]

Order — Under the corresponding section of Act XIV of 1882 it was held that an order obtained by an attorney against his clients for costs is a decree or order which could be executed under the Code[16]

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[1] Gobind Nath v Luchmee Koomaree, (1869) 11 W R, 36

[2] Nilkanth Surmah v Soosela, (1866) 6 W R, 324,

[3] Francisco De Assis v Dos Anjos (1872) 17 W R, 118,

[4] Brindabun Chunder v Ram Koomer, (1864) 1 W R, 139

[5] Shah Mukhun Lall v Kissen Singh, (1867 9) 12 Moo I A, 157, but see Bhup Singh v Zainulabdin, (1887) 9 All, 205

[6] Kassee Nath Roy v Hullodhur, (1865) 2 W R, 60

[7] Pearee Mohun v Mirza Gazee, (1869) 11 W R, 270

[8] Mohomed v Ram Kant, (1891) 16 W R, 266, the lower Court should execute an order dismissing an application for leave to appeal to the Privy Council *Jogendra v Hazadunnissa (1907) 34 Calc, 869*

[9] Broughton v Perhlad Sein, (1873) 19 W. R, 152, Madhub Lal v Noyan Ghose, (1880) 6 C L R, 231

[10] Fani Bhusan v Bama Sundari, (1900) 4 Calc W N, 343

[11] Dorab Ally v Abdool Azeez (1879) 4 Calc, 229; Rodger v Comptoir D Escompte de Paris, L R, (1869 71) 3 P C, 465, Forester v Secretary of State, (1877) L R 4 I A 137 (1878) 3 Calc, 161, Watkins v Mohamed Zahurudin, (1896) 1 Cale W N, excvii

[12] Ramji Morarji v Ellis, (1896) 20 Bom, 167

[13] Tara Prosunno v Satish Chandra (1900) 4 Calc W N, 90

[14] Hurro Durga v Surut Sundari, (1882) 8 Calc, 332

[15] Hurbuns Lall v Sheo Narain Singh, (1874) 21 W R, 391

[16] Premji v Trikumdas (1893) 17 Bom, 514

When costs of an interlocutory proceedings have been disposed of the award of general costs of the suit does not interfere with that interlocutory order [1]

Suit —No suit will lie for costs where the Court has power to grant them in the original proceeding [2]

Defendant cannot sue plaintiff for costs incurred in successfully resisting a claim It is only when the costs are made part of the order that a party can enforce their payment, and then only in execution—Referred Case, 3 Mad H C, 341

Lien of solicitors —See *De Kabu* v *Jefferson* [3]

Heirs —A solicitor cannot enforce under a rule of Court his taxed costs against an heir or legal representative, *Assur* v *Ruttonbai* [4]

Sale—A decree drawn up in accordance with s 88, Act IX of 1882, contained the following clause—' It is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs 876 6, the amount of costs incurred by them in this Court This was held not to be a direction for the recovery of costs personally from the judgment debtor [5]

Set off—The special provisions as to set off of costs contained in sect 221 of Act XIV of 1882 have not been reproduced in this section, but the general words of para 1 seem sufficiently wide to give the Court power in a proper case to direct that the costs payable to one party by another shall be set off against any sum admitted or found in the suit to be due from the former to the latter

The following decisions are worthy of notice

If, in consequence of any defect in the judgment or negligence on the part of the appellant in not getting the decree properly drawn up, costs have not been allowed, no set off can be claimed in execution [6] A mortgagor is entitled to set off or deduct the amount of costs payable to him against or from the mortgage debt payable by him

Execution—No objection as to the amount of costs allowed in the suit can be raised in execution of decree [8] Interest on costs cannot be allowed in execution, unless it is inserted in the decree [9]

Mamlatdar —A Mamlatdar has the same power to levy costs decreed by the High Court as he has regarding costs decreed in his own Court [10]

Interest on Costs —The [illegible]

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[1] Radha Persad v Ram Parmeswar L R (1882 3) 10 I A 113 9 Calc 797.

[2] Mahram Das v Ajudhia (1886) 8 All 452 See also Kabir v Mahadu, (1878) 2 Bom 360

[3] Devkabai v Jefferson (1886) 10 Bom 248

[4] Assur v Ruttonbai (1892) 16 Bom 152

[5] Maqbul Fatima v Lalta Prasad (1898) 20 All 523

[6] Huro Pershad v Foolkishoree (1871) 16 W R 308

[7] Siau v Bali (1893) 17 Bom 32 Set off—As to costs in cases of set off, see Stooke v Taylor (1879 80) 5 Q B D 586 Baines v Bromley (1880 1) 6 Q B D, 691 Brijnath Dass v Juggernath Dass (1879) 4 Calc 742 Ishri v Gopal (1884) 6 All 351 Kisharchand v Madhowji (1880) 4 Bom, 407

[8] Harinath Banerji v Dayhochunder (1866) 5 W R. Mis. 4.

[9] Forester v Secretary of State (1878) 3 Calc 161, L R. 4 I A, 137

[10] Nemava v Devandrayya (1892) 16 Bom, 238

[11] See Khetterpal v Khelal Krishto (1893) 21 Calc, 904 As to a partition suit and the bearing of proportionate costs by lessor and lessee see Nawab Dildar v Bhowani (1907) 34 Calc, 878, 5 Calc L. J, 642

The same rule applies to interest on costs as to interest on mesne profits, and it cannot be given in execution unless expressly granted by the decree,[1] even if the decree be a decree of the Privy Council,[2] and when the decree gives interest only on the principal sum but not upon the costs, the plaintiff is not entitled to to such interest [3] Interest on cost after decree may be the subject of a separate suit [4] but if it is allowed by way of compromise in execution, the appellate Court will not interfere [5]

In England interest runs from the date of judgment in the absence of any order to the contrary [6]

This provision does not cover an order for payment of additional costs of a commission they should be made costs in the suit and entered in the decree [7]

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[1] Pillai v Pillai, (1875) 24 W R, 193, 15 B L. R., 383, L. R, 2 I A, 219

[2] Bhoza Rughbar v Bhoza Raj Singh (1871) 3 All. H C, 319, Forester v Secretary of State (1877) L. R., 4 I A 137, 3 Calc, 161

[3] Ameeroonissa v Mahomed Mozuffur, (1872) 18 W R, 103, Muhtab Chunder v Ram Lall (1878) 3 Calc 351 Gooroo Doss v Stephens (1874) 21 W R., 195 Madan Thakoor v Lopez (1872) 9 B. L. R App 22 18 W R 253

[4] Pillai v Pillai (1874) L. R 2 I A, 219 *supra*

[5] Seth Gokul Doss v Murli (1878) 3 Calc 602 L. R, 5 I A, 78, see also Forester v Secretary of State (1877) L. R 4 I A, 137 This section does not affect the special provisions as to allowance of interest in the Transfer of Property Act—Amolak Ram v Lachmi Narain (1897) 19 All, 174 But see Adlabala v Surendra Nath (1897) 24 Calc 786 and Subbaraya v Ponnusami (1898) 21 Mad 364

[6] Taylor v Roe (1894) 1 Ch 413, see —Ann Prac., (1908) 931

Tadhin v Sardar (1906) 10 Calc, W N, 234

PART II.

EXECUTION.

GENERAL.

36 The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders

Application to orders

The bulk of the provisions relating to execution have been relegated to the Rules (see Order XXI in which they are all grouped under 103 rules), and the main provisions only will be found in this Part These deal with the Courts by which decrees may be executed, the questions to be determined by Courts executing decrees, the limit of time for execution, procedure in execution, arrest and attachment, the distribution of assets and resistance to execution

Orders—generally are made capable of execution by force of this section, see definition of decree holder section 2 *ante*

37 The expression "Court which passed a decree" or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

Definition of Court which passed a decree

(*a*) where the decree to be executed has been passed in the exercise of appellate jurisdiction the Court of first instance, and

(*b*) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed *was* instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit

Act XIV of 1882, sect 649 (2) This section applies to H C and Prov S C C See s 42 (2) Lower Burmah Courts Act, VI of 1900

Civil Court—It was held that the execution Chapter of Act XIV of 1882 applied to an insolvency Court realizing assets [1]

"Ceased to exist or to have jurisdiction to execute it"[2] The terms of the para are general, and draw no distinction as to the nature of the

[1] Bhagwan Das in re, (1884) 8 Bom, 511

[2] Hurro Proshad v Bhupendra Narain, (1880) 7 C L R., 79, 6 Calc, 201; Vishnu v Krishna Rao, (1887) 11 Bom, 153

… profits and

to such interest [3] Interest on cost after decree may be the subject of a separate suit,[4] but if it is allowed by way of compromise in execution, the appellate Court will not interfere [5]

In England interest runs from the date of judgment in the absence of any order to the contrary [6]

This provision does not cover an order for payment of additional costs of a commission, they should be made costs in the suit and entered in the decree [7]

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[1] Pillai v Pillai, (1875) 24 W R, 193 15 B L R, 383, L R, 2 I A, 219

[2] Bhoza Rughbar v Bhoza Raj Singh (1871) 3 All. H C, 319, Forester v Secretary of State, (1877) L R, 4 I A, 137, 3 Calc, 161

[3] Ameeroonissa v Mahomed Mozuffur, (1872) 18 W R, 103, Muhtab Chunder v Ram Lall (1878) 3 Calc, 351, Gooroo Doss v Stephens (1874) 21 W R, 195 Madan Thakoor v Lopez, (1872) 9 B L R, App 22, 18 W R, 253

[4] Pillai v Pillai (1874) L R, 2 I A, 219, *supra*

[5] Seth Gokul Doss v Murli (1878) 3 Calc 602, L R, 5 I A, 78, see also Forester v Secretary of State, (1877) L R, 4 I A, 137 This section does not affect the special provisions as to allowance of interest in the Transfer of Property Act—Amolak Ram v Lachmi Narain (1897) 19 All, 174 But see Achalabala v Surendra Nath, (1897) 24 Calc, 786, and Subbaraya v Ponnusami (1898) 21 Mad., 364

[6] Taylor v Roe (1894) 1 Ch. 413; see — Ann Prac., (1908) 931

[7] Tadhin v Sardar (1906) 10 Calc, W N, 234

(*d*) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction

Act XIV of 1882, Section 223 This sect applies to H C and Prov S C C

May on the application of the decree-holder —The word "may" shows that the clause (*c*) is an extension of the powers of Court to execute its own decree which can be exercised when the procedure described in clauses (*a*) to (*d*) would be inconvenient [1] The terms of the clause are directory not mandatory [2] Every Court is bound to execute its own decree, if it can It is only when the decree cannot be executed within its jurisdiction that it may be sent to another Court for execution There is no intermediate procedure between these two executions [3]

The Court which passed a decree —If the subject matter of the suit is within the Court's jurisdiction, the jurisdiction continues in all matters of execution [4]

Where the Court which has passed the decree has ceased to have jurisdiction, application for execution may be made either to that Court or to the Court which (if the suit wherein the decree has been passed, were instituted at the time of making the application to execute it) would have jurisdiction to try the case [5]

When an execution case is struck off for default by the Court to which the decree has been transferred for execution the proper Court to apply to for a fresh issue of execution is the Court which passed the original decree [6] So also when a decree is transferred by assignment subsequent to its transmission for execution to another Court, the transferee should apply to the Court which passed the decree for execution [7]

Outside British India —See section 43 and compare *Kasturchand v Parsha* [8]

On application — It is not necessary that the decree or a copy of it should be produced with the application [9]

An application to send is not an application to execute within s 230 (O XXIX, r 10)[10] it is a step in aid of execution [11]

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[1] Kartick Nath v Tilukdhari (1888) 15 Calc 667, and see Maseyk v Steel, (1887) 14 Calc 661

[2] Gopi Mohun v Doybaki Nundan (1892) 19 Calc 13

[3] Maharajah of Burdwan v Sree Narain, (1868) 9 W R, 346

[4] Shamrav v Niloji (1886) 10 Bom 200

[5] Latchman Pandeh v Maddan Mohun (1881) 6 Calc, 513, followed in Jahar v Kamini (1901) 28 Calc 238 5 Calc W N, 150, and see Kali Pado v Dino Nath (1898) 25 Calc 315

[6] Bhup Singh v Sunkar Dutt, (1866) 6 W R Mis 47

[7] Kadir Buksh v Ilahi Baksh (1879) 2 All 283 see also Amar Chundra v Guru Prosunno (1900) 27 Calc 488

[8] Kasturchand v Parsha, (1888) 12 Bom 236

[9] Gunga Gobind v Makhun (1868) 9 W R 362 Khettur Mohun v Ishur, (1889) 11 W R, 272 Modhoo Dossia v Nobin Chunder, (1871) 16 W R, 25

[10] Nilmoney Singh v Biressur (1889) 16 Calc, 745 Suja Hossein v Monohur Das (1895) 22 Calc 921, but see S C (1897) 24 Calc, 247

[11] Collins v Maula Bakhsh, (1879) 2 All, 284 Latchman Pundeh v Maddhan

cause which puts an end to the *jurisdiction*[1] Under Madras Act III of 1873 s 28 a Munsif was invested with the powers of a Small Cause Court Judge for the trial of suits cognizable by such Court up to Rs 200 in value Subsequent to decree but prior to execution, his powers as Small Cause Court Judge were withdrawn by notification in the Gazette *Held*, that the application for execution must be made to the Court in which the Small Cause Court jurisdiction vested at the date of the application

Where a mortgage decree was passed, and before any application for execution was made the property mortgaged was transferred to another Munsif *held* application could be made to either Court[2] And the Court to which a decree is transferred for execution if it has ceased to have territorial jurisdiction may either of its own motion or when applied to transfer it for execution to the Court which has territorial jurisdiction[4] A obtained a decree against B in the Court of the 1st Munsif of Howrah After the decree, the local area within which the cause of action arose and the judgment debtor resided, was transferred to the 2nd Munsif A then applied to the 2nd Munsif to execute his decree *Held* that the 2nd Munsif had no jurisdiction, and the 1st Munsif alone had jurisdiction to execute the decree[5]

COURTS BY WHICH DECREES MAY BE EXECUTED

Court by which decree may be executed

38 A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution

Transfer of decree

39 (*1*) The Court which passed a decree may, on the application of the decree holder, send it for execution to another Court,—

(*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(*b*) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(*c*) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

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[1] Gauskha v Abdul Ropkha (1893) 17 Bom, 162

[2] Zamindar of Vallur v Adinarayulu (1896) 19 Mad, 445

[3] Latchman v Muddun, (1880) 7 C L R, 521 6 Calc, 513

[4] Giri dro Chunder v Jarawa Kumari, (1893) 20 Calc 105

[5] Kali Pado Mukerjee v Dino Nath Mukerjee, (1898) 25 Calc, 315 But in Jafar v Kamalini (1900) 5 Calc, W N 150, 28 Calc, 238 in which the facts were similar it was held that the decree could be executed by either Court

(*d*) if the Court which passed the decree considers for any other reason which it shall record in writing, that the decree should be executed by such other Court

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction

Act XIV of 188 Sec on 3 Tl s sect appl es t ll (an l l r v (r

May on the application of the decree holder—Il e w t ay" sho s that tl e clause (*c*) s an extens on of tl e ; were f (t t e e e s o n decree wl cl can be exer sel len tl e pr rl r l r t clauses (*a*) to (*l*) ould be nconven ent[1] Tl e terms f tl e l e a e y not mandato y E ery Cou t s lou l t exe te s vn l e f l It s only l en the lecree cannot be exe ute l l ts j l tl r may l e sent to ano l er Court for exec t on Tl ere s a n er l j f bet een these t o execut ons[3]

The Court which passed a decree If tl e s l je t a f tl e su t is w th n the Courts jur sd ct on tl e j s l o t n l of execut on[4]

Where the Court vl cl ha passed tl e le ree l e ae l t l ve j a t on appl cat on for execu n ay be ma le e l er t tl t C u t t e f vh ch (f the su t here n the decree has l een j asse l vere e l t tl e t me of mak ng the appl cat on to execute t) oul l l e j r s l t t try tl e case[5]

When an execut on case s s ruck off for lefa l l y l e (t t vl l tl decree has been tran ferre l for execut on tl e p j er C t t l y f f esh ssue of exec t on s the C urt l cl pa e l l e l le l l when a decree s transfer ed by a s gnment ls j ent t t t execut on to another Court the transferee sl ould pply t tl e (t wl l passed the decree for execut on[7]

Outside British India—See sect on 43 and con j e A / / / *Parsl a*[8]

On application It s not necessary tl at tl e dec ee a j y f l al ll be produced w th the appl ca o[9]

An app ca on to send s no a appl cat on to exec e v l s 23 (() XXIX r o)[10] t s a s ep n a d of execu on[11]

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[1] Ka t ck Nath *v* l kdha (1888) 15 C lc 667 a l s M k yk H l (1887) 14 Calc 661

[2] Gop Mol un *v* Doybak N ndan 189) 19 Calc 13

[3] Maha ajal of Bu dwan Sree Na a n (1868) 9 W R 340

Shamra *v* N loj (1886) 10 Bom 200

Latel man Pa lel Madd Mol un 1881) 6 Calc 513 foll l In J ar Kam n (1901) 28 Calc 238 o Ca e W N 150 an l seo Kal la l Nath (1898) 25 Calc 315

[4] Bhup S ngh *v* Sunkar Dutt (1866) 6 W P M s 47

Kad r Buksh *v* Ilah Baksl (18 9) All 283 see also An ar Cl l a G r Prosu no (1900) 27 Calc 488

[5] Kasturchand *v* Parsha (1888) 12 Bom 236

[6] Gu ga Gob nd *v* Mak u 1868 9 W R 302 I lettur Mo u *v* Ial r (1889) 11 W P 2 2 Modhoo Dos a *v* Nob Chunder (1871) 16 W R 2

[9] Ni money S ngl *v* B ressur (1889 16 Calc 745 Suja H s e n Monol ur Da (1895 Calc 9 1 but s e S C 1897 4 Calc 4

Coll ns *v* Maula B khsh (1879) All 284 Latchman

What decree may be executed—Whether the decree of the lower Court is reversed, modified or affirmed, the decree passed in the appellate Court is the final decree, and as such the only decree capable of execution[1] And if it is altered by the Court limitation runs from the date of the decree[2] And hence it is expedient in all cases first instance, execution cannot issue;[3] and hence it is intended to affirm and thus avoid decree Thus, wholly so much of the decree as it is intended to affirm and where the decree in the appellate be upheld and the to the suspended decree;[4] and where the decree appeared from the first Court specified in the first decreed Rs 195 costs, and as a fact it was executed,[5] but where declared fraudulent and void is not complete in itself, reference must be made to the lower Court A and B, and is susceptible of execute the last decree was "that the order of the lower C ... the costs" the costs peal dismissed, appellant to pay the costs, which has recovered[7] A decree which has been against C only, is a subsisting decree ...

Decree creating a charge—...decree were ... against C only, is a subsisting decree ...tion[8]

tains a direction for its payment, and default ... enforcement is not to apply for execution ... account and sale, or to institute a suit for enforcement ... When a decree creates a charge and ... it is made, the proper course ... is to apply for an order ... the charge[9]

Special appeals—In the case of *Kisto Kinker Ghose* v. *Burrodacaunt*,[10] their lordships of the Privy Council suggested that there might be ... the appellate Court, especially in special appeal, might see good reason to limit ... and to abstain from confirming a ... not open to examination by reason ... This suggestion has not been ... last decree affirms and adopts the ... d the ... the

Privy Council—Although an order of Her Majesty in Council may only confirm the decree of the Court below, it is the order that must be executed[12]

Mohun, (1881) 6 Calc 513, Chundra Nath v Gurroo Prosunno (1895) 22 Calc, 375 So also is an application to re transfer—Chandra Nath Nag v Bhudar Chandra Roy, (1898) 2 Calc W N, cclxxi See "LIMITATION," p 170

[1] Ram Charan v Lakhi Kant, (1871) 7 B L R, 704; Muhammad Sulaiman v Muhammad Yar, (1889) 11 All, 267, but see Naourang Rai v Latif Chaudhri, (1891) 13 All, 394

[2] Sakhal Chand v Velchand Gujar, (1894) 18 Bom, 203; Nanchand v Vithu, (1895) 19 Bom, 258

[3] Muhammad Sulaiman v Fatima, (1889) 11 All, 314.

[4] Kisto Kinker Ghose v Burrodacaunt, (1872) 10 B L R, 101

[5] Shohrat Singh v Bridgman, (1872) 4 All, 376, see, however, Mir Ajmuddin v Mathuradas, (1874) 11 Bom H C, 206

[6] Shohrat Singh v Bridgman, (1882) 4 All, 376

[7] Himayat v Jai Devi, (1883) 5 All, 589, Behari Lal v Khub Chand, (1886) 6 All, 48 See also Gobardhan Das v Gopal Ram, (1885) 7 All, 366.

[8] Pasupati Nath v Nando Lal Bose, (1903) 30 Calc, 718.

[9] Chundramoni Dassee v Mutty Lall Mullick, (1908) 2 Calc W N, 33; Aubhoyessury v Gouri Sankar Panday, (1895) 22 Calc, 859, and Matangani v Chooneymoney, (1895) 22 Calc, 903

[10] Kisto Kinker Ghose v Burrodacaunt, (1872) 10 B L R, 101

[11] ... 7 All, 366 See also Noor Ali v Koni ... ad Sulaiman v Muhammed Yar, (1889) ... oghu Nath (1895) 22 Calc, 467. Bistoo ... W R, 57.

[12] Luchmun Persad v Kishun, (1882) 8 Calc, 218

(*a*) **Resides** —See notes on section 20 *ante* Where plaintiff sought to execute his decree by attaching the pay of his debtor, and neither the debtor nor his payer resided within the local jurisdiction, the order of attachment was held void [1]

(*b*) **Has not property within local limits** —Before a Court will act in such a case, it will require to be satisfied in some manner, by sworn testimony or by affidavit, that these facts exist Where a decree has been executed by a Court other than that in which it was passed, the title of the purchaser cannot be avoided by shewing that there was property of the judgment debtor within the jurisdiction of the Court that passed the decree, which might have been attached and sold [2]

(*c*) **Outside jurisdic**

property in execution of a m

either at the time of suit

mortgage decree properly pa

jurisdiction, execution may be pursued either in the Court which passed the decree or the Court within whose jurisdiction it lay at the time of application [4]

A suit on a mortgage was instituted in the Court of a Munsif competent

Not wholly outside —Where a decree was obtained in one district on a mortgage in connection with lands lying in different districts and registered in the Collectorate of another district, it was held the Court giving the decree could sell the property, though a doubt was expressed if this could be done under a simple money decree [6]

In such cases, the Court is not bound to send the case to another Court under clause (c) but may do so [7] it was decided that a Munsif had power under a money decree to sell a share of an estate lying within three Munsifees in the same district A Court that can pass a decree for the sale of property comprised in a mortgage may sell it, even though a portion be situated outside the local limits of its jurisdiction [8]

Concurrent execution —A decree given in the District of Burdwan was

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[1] Rango v Balkrishna (1888) 12 Bom , 44

[2] Kaleo Prosunno Bose v D nonath (1873) 11 B L R , 56 , 19 W R 434

[3] Prem Chand Dey v Mokhada, (1890) 17 Calc 699

[4] Kartick Nath v Tilukdhari (1888) 15 Calc 667 , Latchman Pundeh v ... der v Ameerunnissa ... 5) 23 W R , 154 , and 699 , and Kali Pado v

[5] Gomatham Alamelu v Komandur Krishnamacharlu, (1904) 27 Mad , 118

[6] Maseyk v Steel (1887) 14 Calc 661 , followed in Kartick Nath Pandey v Tilukdhari, (1888) 15 Calc , 667

[7] Gopimohan v Doybaki, (1896) 19 Calc , 13 Jag... (1895) 22 Calc , 875 , Ram Lall Moitra v Bama

[8] Tincourie Debya v Shib Chandra Pal (1894) 21 C

and could be made if a Court should, in exercise of its discretion, think fit to do so Their lordships remarked, —"It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power and to refuse to send a decree for concurrent execution into several places, and when it did act on it, it would be in many cases proper to impose terms on the decree holders, that they should not proceed to the sale under all the attachments at once."[1]

Of its own Motion —A decree may be sent for execution to another Court, either on the application of the decree holder on one of the grounds stated in this section, or by the Court which passed it of its own motion, but in this latter case, the transfer can be only to a subordinate Court In *Krishna Velji* v. *Bhau Mansaram*,[2] a doubt was expressed whether under sub section (d) a Subordinate Judge can transfer a decree from his Court to that of a Small Cause Court, when the property attached is within the limits of his local jurisdiction

A Court of Small Causes cannot execute its own decree against moveable property situated outside its jurisdiction It must transfer it under this section [3]

Practice – It will be necessary for the holder of a decree which has been transferred for execution to another Court to make due application for execution to that Court (Order XXI, r 10) A District Court, on receiving a decree transferred for execution, can direct any Subordinate Court to execute it [4] Where both Courts are in the same district, one Court may send to the other direct [5]

Appeal.—An appeal lies against an order rejecting an application for the transfer of a decree [6]

Limitation —An application under this section is not an application to execute,[7] but is an application to keep in force a decree,[8] being a step in aid of execution [9] If the application is made by a vakil after the death of his client, it does not save time running [10] But if the fact of the client's death is unknown to the pleader at the time of making such application, it is one in accordance with law [11] See "STEP IN AID OF EXECUTION, p 181 *supra*, see note on section 37

Value jurisdiction —A Munsiff may execute a transferred decree of any amount and is not limited to his ordinary jurisdiction [12]

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[1] Saroda Prosad v. Luchmeeput (1872) 17 W R, 289, 10 B L R, 214; 14 Moo I A 529, Krishto Kishore Dutt v. Rooplall, (1882) 8 Calc, 687.

[2] Krishna Velji v. Bhau Mansaram, (1894) 18 Bom, 61

[3] Parbati Charan v. Panchanand, (1884) 6 All. 243, Mansuk Mosundas v. Shivram Dausing (1873) 2 Bom, 532, Grish Chandra v. Kristo Chunder, (1872) 18 W R, 123 but see Kodoo Mundol v. Shushee Shikhur, (1871) 16 W R., 227.

[4] Order XXI r 5 Such an order need not necessarily bear the signature of the District Judge himself Jogendra v. Mohesh Chandra (1896) 23 Calc, 480.

[5] Kelu v. Vakrisha, (1892) 15 Mad, 345

[6] Bhabani Charan v. Pratap Chandra, (1903 4) 8 Calc. W N, 575

[7] Nilmony Singh v. Biressur Banerjee, (1889) 16 Calc, 744

[8] Collins v. Maula Bakhsh, (1878) 2 All, 284

[9] [illegible] Shye, (1881) 6 Calc, 513, Rajbullubh [illegible] handra Nath Gossami v. Gurroo Prosunno [illegible] Nath Sen v. Gouri Sankar Khatrree, [illegible]

[10] Kallu v. Muhammad, (1885) 7 All, 564

[11] Amirunnessa v. Ahsanullay, (1883) 13 C L R, 18

[12] N [illegible] 7, Shanmuga Pillai v. [illegible] rga Charan v. Umatara, (1889) 16 Calc, 457. [illegible] and compare, Kelu v. [illegible] (1892) 15 Mad, 345

40 Where a decree is sent for execution in another Province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that Province

Transfer of decree to Court in another Province

This is a new section the insertion of which is necessary by the powers given to the High Courts to alter or add to the rules under

41 The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure

Result of execution proceedings to be certified

Act XIV of 1882 sect 223 fourth para This section is mandatory ... executing Court cannot refuse to transmit the record of ... Court which passed the decree [1]

42 The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself

Powers of Court in executing transferred decree

Act XIV of 1882, Sect 228

This applies to H C and Prov S C C

The functions of a Court in respect of the execution ... Courts are judicial not ministerial but are confined to matters arising out of the proceedings in execution ... which the decree has been transferred must execute ... It cannot call its legality into question [6]

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[1] Indu Chunder v Gopal Chand (18..) 11 ... to the Court which passed it p 182 ...

[2] Govind Hari Walekar v Shidram (18..)

[3] Jadu Roy v Farrell (1870) 6 B L R ...

[4] Krishtokishore v Rooplall (1882) 8 Cal ...

[5] Kashi Pershad v Jamuna (1904) 31 Cal ...

[6] Subramaniam v Panjamma (1892) 4 Mad ... Bom 481 Kastrshet v Rama (18..) (1891) 15 Bom 307 temporarily—P. 330 see however Order XXI r 7 (1889) 11 All 314

[7] Rajerav v Nanarav, (188.) 11 Bom ... 21 Bom 406

decree was unsaleable[1] nor can it alter, vary or add to, the terms of the decree,[2] nor extend its scope,[3] nor correct errors,[4] nor extend the period of redemption,[5] nor execute before the period fixed in the decree,[6] nor in instalments contrary to its terms[7] nor inquire whether the balance certified to be due on the decree is correct[8] nor admit an assignee to be substituted for the decree holder,[9] nor entertain any question of the right of a transferee whose name is on the record and has taken out execution[10] nor of the right of the person asking for execution[11] nor entertain an application by the judgment debtor to be declared an insolvent[12] nor transmit the decree to a third district for execution[13] nor when the decree is more than one year old before its transfer, should it issue a [illegible] [14] not [illegible] first [illegible] be [illegible] long as the documents, specified in Order XXI, r 6, remain filed in it,[15] or determine the claim of a third party to property attached in execution[16] It can decide if the application is barred[17] but the question must be one arising from facts which are legitimately before the Court in the course of execution and not a matter of

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[1] Sadashivlalit v Jayantibai (1884) 8 Bom 185 Madho Lal v Katwari, (1888) 10 All 130 Bisheshar v Sukhdeo (1888) 10 All, 132 note

[2] Forester v Secretary of State [illegible] Pillai v Pillai (1874 5) L [illegible] (1881 2) L R 9 I A, p 1 [illegible] 4 Mad, 324 Ramphal v [illegible] Tokhan, (1901) 28 Calc, 353

[3] Muttia v Virammal (1887) 10 Mad, 283

[4] Nilkomul Roy v Rohinee (1870) 13 W R, 330 Rao Omrao Singh v Sutun Lall (1869) 1 All H C 77

[5] Ishwargar v Chudasama (1889) 13 Bom 106, Subhana v Krishna (1891) 15 Bom 644

[6] Hair Dyal v Chadami Lal (1885) 7 All 194

[7] Sheo Pershad v Shiva Ram (1870) 2 All H C 59

[8] Keshub Chunder v Khelut Chunder, (1868) 9 W R., 361

[9] Sheo Narain Singh v Hurbuns Lal, (1870) 5 B L R 497, 14 W R 65, see Order XXI, r 16

[10] Ram Chunder v Mehendro Nath (1874) 21 W. R, 141

[11] Dhunesh Koeree v Oolfust Hussein, (1874) 21 W R, 210

[12] Venkatasami v Narayanaratanam (1888) 11 Mad, 301

[13] Dhunput Singh v Wooma Sunkuree, (1874) 21 W R, 337, Shib Narain v Bipin Behary (1878) 3 Calc 512

[14] [illegible] J, 152 Jado [illegible] Kirat Chand, [illegible] ut see Nursing [illegible] and Sribary Mundul v Murari (1886) 13 Calc, 257, though it can issue a notice on the debtor to shew cause, if the decree has been transferred within one year of its passing but remained unexecuted after that period—Chhagan Lal v Jamnadas Mancharam (1874) 11 Bom, H C, A C. J, 19 (see Order XXI, r 26)

[15] Bagram v Wise (1864) 1 B L R, 91, but see Brojendro Narain Roy v Bindle Ram Sen (1869) 11 W R, 269

[16] Indu Chunder v Gopal Chunder, (1869) 11 W R, 557, 3 B L R, 181, Vishnu v Narsingrav (1882) 6 Bom, 584

[17] Leake v Daniel (1863 7) B L R, (F B) 970, 10 W R (F B) 10, Buzur Buhee v Jackson (1866) 5 W R Mis, 14 Baikunt Nath v Joy Gopal, (1867) 7 W R 19, Nursing Doyal v Hurrihur, (1880) 5 Calc., 897, Chota Lal v Manickchand, (1874 5) 7 All, H C, 115; Chhotay Lal v Purna Mull, (1896) 23 Calc 39

limitation arising antecedent to transfer,[1] unless the Court ... decree for execution has decided that it is not[2] The Court ... sent for execution retains its jurisdiction to execute the decree ... has been withdrawn from it, or until it has fully executed ... certified that fact to the Court which sent the decree, or has ... that Court has been able to execute it within its jurisdiction and ...

necessary for the Court to send any c... decree for execution[3] If a Court to ... certified to the Court which passed the ...

to receive a subse... t, then, to deal with the ...

Lex fori —If there are different laws of limitation in the ... law applicable to the proceedings in execution of the decree should ... the Court which passed the decree[5]

Exclusive jurisdiction —Where a decree has been transferred ... on to another district the first Court cannot call ...

in the first Court and this is certified to the Court executing, the latter ... stay proceedings pending an adjudication on the petition[7] See ... Order XXI, r 25

Concurrent jurisdiction —Where a decree has been transferred and ... on ... limitation ... the former stays ...

Step in aid of execution —An application to the Court executing ... return the proceedings to the original Court[9] or by a decree holder to be put in possession of property he purchased in execution of his decree is a step in aid of execution[10] Neither an application to receive a poundage fee ...

[1] Sumat Das in the matter of (1873 4) 13 B L R App p 27 21 W R ... also Lutfullah v Kiratchand (1873 4) 13 B L R App 30 21 W R ...

[2] Husein Ahmed v Saju Mahamad (1891) 15 Bom 28 And see ... Hurryhur (1880) 5 Calc 897 Srihary Mundal v M... (1880) ... Ramu Rai v Dayal Singh (1894) 16 All 390

[3] Abda Begam v Muzaffar Husen (1893) 20 All 129

[4] Mathura Nath v Kailas Chandra (1898 9) 3 Calc W N ccxi

[5] Tincowree Dawn v Debendro Nath (1890) 17 Calc 491 See however Hukum chand v Gyaneder (1887) 14 Calc 570 And for the old law see ... Daniel (1863 7) B L R (F B) 970

[6] Indur Chunder v Gopal Chunder (1869) 11 W R 527 3 B L R, 181

[7] Vishnu v Narsingrav, (1882) 6 Bom 584

[8] Srihary Mundul v Murrari (1886) 13 Calc 257 See also the remarks of Mahmood J in the case of Gearilal v Fukir (1885 7 All, 73, p 76 and 'STAY THE EXECUTION,' Order XXI r 26

[9] Krishnayyar v Venkayyar, (1883) 6 Mad 81 Latchman Pundeh v Madan Mohun (1881) 6 Calc 513 Rajballubh v Joykishen (1893) 20 Calc 29; Husain Buksh v Madge, (1876 8) 1 All, 525 Valliya v Jaganath (1884) 7 Mad, 307

[10] Sariatoolla v Raj Kumar Ray (1900) 27 Calc, 709

application to be allowed to set off the purchase money against the decree is step in aid of execution [1]

Shall certify to the Court which passed it—If the decree holder requires that the decree should be executed in the original district before the return of the certificate the original Court may recall the proceedings [2] On the other hand if the judgment debtor has out of Court partly satisfied the debt, subsequent to the transmission of the decree for execution to another Court, but before actual execution has been applied for, he is entitled on execution being demanded in full to an order from the Court to which the decree has been transferred calling upon the decree holder to certify the fact of such payment [3] The decree holder may apply to the Court to which the decree has been transferred to send the necessary certificate and return the decree but this application is not a step in aid of execution nor is an application to receive poundage fees from him [4]

Appeal—A suit not exceeding Rs 500 in value was brought in a Court exercising jurisdiction as a Court of Small Causes That Court passed a decree and transferred it for execution to the Munsiff who passed an order in execution, which was confirmed in appeal *H H* that (section 102) controlled the provisions in a case of this kind and no second appeal lay [5]

Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory

43 Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Governor General in Council in the territories of any Foreign Prince or State[6] may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India

Act XIV of 1882, Section 229 This Section applies to H C and Prov S C C

This provision has been extended by this Act to Civil Courts in British India to which the execution sections of this Code do not apply

Applicants under this section must show that the Court passing the decree is one or other of the Courts referred to in this section Thus where it was not [illegible] Court within [illegible] eign State, it [illegible] e its decree [7] [illegible] passed by a

[1] Ananda Mohun Roy v Hara Sundari (1896) 23 Calc, 196

[2] Ashootosh Dutt v Doorga Churn Chatterjee (1881) 6 Calc, 504

[3] Rajendro Nath Roy v Chunnoomul, (1880) 5 Calc 418

[4] Aghore Kali Debi v Prosunno Coomar Banerjee, (1895) 22 Calc, 827

[5] Kanhia Pershad v Lal Behary Lal (1898) 25 Calc, 872, Harakh v Ram Sarup (1890) 12 All, 579

[6] [illegible]

[illegible] Chandra v Dinanath (1869 70) 4 B L R, A C, 131.

[8] Kashi [illegible] v Bishnoo Prasad, (1888) 15 Calc, 356

Civil Court of the Chittagong Hill tracts, which is a Scheduled district, could be executed by a Munsif in the regulation district of Chittagong But see section 89

Civil Courts in Native States in Bombay —See notification published in Bombay Government Gazette, March 18th, 1880, Part 1, pp 290 291

This provision does not apply to the family domains of the Maharajah of Benares,[1] nor to the Court of the Sub Judge of Kondh [2]

Execution of decrees passed by Courts of Native States

44 The Governor General in Council may, by notification[3] in the Gazette of India, declare[4] that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India

Act XIV of 1882, section 229 B This section applies to H C and Prov S C C

The provision for cancellation of such declaration has not been reproduced in this section [5]

May be executed —This means that it is legal and possible to execute the decree, but a Court in British India is not bound to execute a foreign decree obtained by fraud or passed by a Court not having jurisdiction [6]

In the absence of a prior notification as specified in clause 44 and 45 no decree by a Court in British India can be sent for execution into a territory such as Mayoorbhunj which is a tributary Mahal and outside British India [7]

The judgment of a foreign Court, on a decree obtained in British India, is no bar to the execution of the original decree [8]

[1] Prabha v Saligram, (1907) 34 Calc 576

[2] Maharaja Prabhu Narayan v Saligram Singh, (1906 7) 11 Calc W N 622

[3] For notifications as to execution of decrees of Native States Courts in British India see General Appendix to Macpherson's British Enactments in force in Native States Ed 1899—*Note Legislative Dept*

[4] [illegible] see Notification No 4055 I dated [illegible] 1885 Part 1 page 667 No 233 I [illegible] General Appendix to Macpherson's [illegible] States Southern India Madras and [illegible] printed at pp 378 to 381 of Ma[illegible] British Enactments in force in Native States (Western India) Ed 1895 —*Note Legislative Dept*

[5] F[illegible] dated [illegible] 1688 I, [illegible] *Legis*[illegible]

[6] [illegible] t suits see Hukumchand [illegible] in which a foreign decree [illegible]) 14 Calc 546 and exe[illegible]

[7] Ratan Mahanti v Khatoo Sahoo (1902) 29 Calc 400 6 Calc W N, 573 See also Kastur Chand v Parsha Mahar (1888) 12 Bom 230

[8] Fakuruddeen Mahomed v Official Trustee, (1881) 7 Calc, 82

Execution of decrees in foreign territory

45 So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor General in Council in the territories of any Foreign Prince or State to which the Governor General in Council has, by notification in the Gazette of India, declared this section to apply [1]

Act XIV of 1882, Sect 229 A This section applies to H C and Prov S C C

Precepts

46 (1) Upon the application of the decree holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree holder has applied for an order for the sale of such property

This is a new provision, the idea of which is taken from the practice in England A *præcipe* or [illegible] r 12 before issue of any writ of execution [illegible] reference to the record, the date of [illegible] the names of the parties, against whom [illegible] signed by the party issuing it or by his [illegible] of this document, a writ of execution follows which is transmitted to the Sheriff or other officer of the District or County in which the debtor or his property is to be attached

App E Form No 7—Gives the form of precept intended to be used under [illegible] of the result of Proceedings upon the [illegible] interim attachment of property [illegible] the suit or proceeding is pending, [illegible] attachment shall expire at the end [illegible] order of the Court which issued the [illegible] or unless the decree is in the meantime transferred and the decree holder has applied for an order of sale

The effect of this proviso seems to be that if the decree holder applies for execution in the transferee Court before his interim attachment expires, he will not be obliged to re-attach the property; if he delays, re-attachment becomes necessary.

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

Questions to be determined by the Court executing decree

47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

Act XIV of 1882, sect. 244. This section applies to H. C. and Prov. S. C. C. and to execution of a decree passed under s. 53, Act XX of 1866,[1] but not to proceedings under Act X of 1859.

A proceeding under the corresponding section of Act XIV of 1882 was not a suit within the meaning of section 10.[3]

Court executing the decree.—This includes both the Original Court and the Court, if any, to which the decree has been sent for execution.[4]

Revenue Court.—This section does not apply to a Revenue Court, so the remedy of a person entitled to a refund in consequence of a reversal in appeal of the decree of a Revenue Court is both by means of an application in execution and by a separate suit.[5]

This section re-embodies in altered from the much discussed provisions of Section 244 of the former Code.

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[1] Sribullav v. Baburam (1886) 12 Calc. 511; Bhikambhat v. Fernandez (1881) 5 Bom. 673.

[2] Brojo v. Busirunnissa (1888) 15 Calc. 183.

[3] Venkata v. Venkatarama (1899) 22 Mad. 256.

[4] Ghazidin v. Fakir (1885) 7 All. 73.

[5] Masih-ullah Khan v. Majidunnissa (1904) 26 All. 149.

determined by the decree and not in execution [1] The provision of *preliminary* as opposed to final decrees facilitates the introduction of this practice The declaration of the plaintiff's rights and the order for delivery of possession can be embodied in the preliminary decree which can also in proper case, declare the amount of mesne profits accrued due to the plaintiff up to the date of the institution of the suit [2] Such a decree will be appealable and capable of execution see section 36 and note to section 2 (2) and (3) *vide* "*Decree*" and "*Decree holder*", so that the proceedings will not be delayed by an inquiry as to the amount of mesne profits subsequent to the institution of the suit The result of this inquiry can then be embodied in the final decree passed in the original suit This seems to be shortly the practice indicated by the compilers of the Code but looking more closely to the wording of this section and of Order XX r 12 it appears that no absolute bar has been placed by the Legislature to the continuance of the old practice

Order XX r 12 embodies the provisions of sections 211 and 212 of the former Code without material alteration of the powers of the Court thereunder and this section enacts that all questions relating to execution shall be determined by the Court executing the decree and it remains for the Courts themselves to decide whether any and what questions regarding mesne profits and interest are to be considered to relate to execution within the meaning of this section —The decisions relating to mesne profits under former Codes will be found under section 2 (12) *vide Mesne profits* and Order XX r 12

Parties to the suit —The Explanation puts an end to a conflict of decisions and the dismissal of a suit or part of it does not take the parties affected out of the meaning of this section The question must arise between parties to a suit, and on the record [3] whether put rightly or wrongly [4] But where it does so arise it cannot be got rid of by adding unnecessary parties [5] nor does a decree holder cease to be a party by becoming a purchaser [6] Intervenors when the suit has been disposed of without decisions of their claims are not parties to the suit [7] In a suit for partition the mother of the other parties claimed a share The latter compromised the suit and a decree was passed behind her back, under which she was dispossessed of certain property *Held* she was a party to the suit and her objection that the decree did not bind her, and her claim to be restored to possession should have been decided under this section [8] A purchaser at a sale in execution of a decree is not a party [9] nor a purchaser *pendente lite* of property in suit [10] Nor is the purchaser of the rights of the judgment debtor which were sold in execution of a money decree obtained by the mortgagee, and subject to that mortgage a party to the suit in which the decree was passed, [11] nor is one who though originally a defendant has been released from the operation of the decree [12] when an intervenor has been made a defendant, and exempted from the operation of the decree but directed by the Appellate Court to pay costs he still continues to be a party to the suit [13] The purchaser

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[1] See Report of Special Committee

[2] See Order XX r 12

[3] Mohendro Narain v Gopal Mondul (1890) 17 Calc, 769 p 777 Paman v Muppil Nasar (1891) 14 Mad 478

[4] Bhuggobutty v Money (1878) 2 C L R 545

[5] Kristo Mohinee v Kaliprosonno (1882) 8 Calc 402

[6] Muthia v Appasami (1890) 13 Mad 504

[7] Kalka Prasad v Basant Ram (1901) 23 All 346

[8] Sankaravadivammal v Kumarasamya (1885) 8 Mad 473, see Gour Kishore v Mahomed Hassim (1868) 10 W R 191 and Gowri v Vigneshwar (1893) 17 Bom 49

[9] Vishvanath v Salrava (1891) 15 Bom 290 Hira Lal v Courmoni (1880) 13 Calc 326, Shivram v Java (1888) 13 Bom 34 and the cases cited there

[10] Aga Syed Abdool v Lenaux (1869 70) 13 Moo I A, 69

[11] Narain Acharjee v Cregory (1867) 8 W R 304

[12] Gour Kishore v Mahomed Hassim (1868) 10 W R, 191

[13] Hurce Kishore v Kalee Kishore (1867) 8 W R, 114

no party to the suit [8]

If a legal representative sets up a title to property as his own in execution of decree, the dispute falls within this section and not under Order XXI, r. 57,[12] unless that portion of the decree which is being executed does not bind the objector,[13] but it has been held that, if a debtor objects that he holds the property attached as wakf,[14] or in any right not personal to himself,[15] such a holding being not as owner but as trustee, he is not bound by the decision in execution [16]

[1] Mohabir Singh v Ram Bhaghowan, (1885) 11 Calc, 150

[2] Afzuloonnissa v Parbutty Koonwur, (1865) 2 W R Mis, 42, Ram Chunder v. Musstt Hamiran, (1907) 11 Calc W. N, 433

[3] Deen Dyal v Radha Muddum, (1868) 9 W R, 223, Sanjivi v Ramasami, (1885) 8 Mad, 491

[4] Luchmeeput Singh v Lekraj Roy, (1865) 2 W R Mis, 56, Raghunath Das v Badri Prasad (1884) 6 All, 21, Sevu v Muttusami (1887) 10 Mad, 53

[5] Ameeroonnissa v Abedoonnissa, (1871) 16 W R, 307

[6] Collector of Ratnagiri v Janardan (1882) 6 Bom 590, Collector of Kanara v Krishnappa (1891) 15 Bom 77 otherwise in Allahabad,—Janki v Collector of Allahabad (1887) 9 All 64 Secretary of State v Bhagwanti (1891) 13 All, 326

[7] Sikooram Agurwalla v Komolakant Dey, (1865) 2 W R, 65

[8] Collector of Trichinopoly v Sivarama Krishna, (1900) 23 Mad, 73

[9] Wahed Ali v Jumaee, (1872) 11 B L R 149 (1872) 18 W R, 185, Oseemunnissa v Ameeroonnissa (1873) 20 W R, 162, Buddu Ramaiya v Venkaiya, (1866 8) 3 Mad H C, 263

[10] Seth Chand v Durga (1890) 12 All, 313, see also Arunddhati v Natesha, (1882) 5 Mad, 391

[11] Ghoree Lal v Sheo Narain (1867) 8 W R, 24, Suleman v Shivram, (1888) 12 Bom 71

[12] Seth Chand v Durga (1890) 12 All, 313, Rajrup Singh v Ramgolam Roy, (1889) 16 Calc, 1, Kuriyali v Mayan, (1884) 7 Mad, 255, Ravunni v Kunju (1887) 10 Mad, 117, Nimba v Sitaram, (1885) 9 Bom, 458, Punchanun v Rabia (1890) 17 Calc, 711 Sitaram v Bhagwan (1885) 7 All, 733

[13] Jangi Nath v Phundo, (1889) 11 All 74 Bukshi Ram v Sheo Pergash, (1886) 12 Calc, 453, Mungeshur Kuar v Jamoonna, (1889) 16 Calc, 603

[14] Nathmal v Tajammul (1885) 7 All, 36

[15] Ram Ghulam v Hazaru Kuar, (1885) 7 All, 547, Sita Ram v Bhagwan Das, (1885) 7 All, 733

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Parties originally made parties to a suit, but expressly exempted from the operation of the decree are not parties to the suit within the meaning of this section Their objections to the attachment of their property by the decree holder must be considered to be objections under Order XXI, r 57 [1] Proceedings in execution of a decree taken against the plaintiff's father and eldest brother on previous occasions did not bind the plaintiffs, who were not parties to them, within the meaning of the corresponding section of the former Code [2]

Representatives —Sub section (3) now makes it incumbent upon the Court to decide questions as to representatives arising under this section outright and no option is given to remit the parties to a separate suit The power given by this section to decide such questions must not be construed as cutting down in any way the power of the Court which passed the decree to give leave to execute it against a deceased judgment debtor's legal representative under section 50 [3] The following decisions under Act XIV of 1882 may be used in the interpretation of this word for the purposes of this section —

The term "representative when used with reference to the judgment debtor, does not mean only his legal representative, that is, his heir, executor or administrator, but his representative in interest and includes a purchaser, who so far as such interest is concerned is bound by the decree [4] It includes persons by whom the decree may be executed under section 50 and Order XXI, such as the assignee of the decree holder [5] It has been further held to include subsequent transferees of a transferee under Order XXI, r 16 (sec 232) [6] But in a later Calcutta case the assignee of an auction purchaser was held to be outside the meaning of the word [7]

The mortgagee of a transferable occupancy holding claiming prior to sale in execution of a rent decree is a representative [8]

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v Gauri Sahai, (1886) 8 All, 626.

[1] Mubarrak Hussain v Hurmatunnissa, (1896) 18 All, 52 But see s 248 cl (c) (Order XXI, r 57) and the cases under Order XXI, r 57 'Claims to Property'

[2] Krishnaji v Vithalrav, (1888) 12 Bom, 80

[3] Swaminatha v Vaidyanatha, (1905) 28 Mad 466.

[4] Islam [illegible]

[illegible]

[5] Jamini v Debi, (1906) 4 Calc L J 192, and see Peari v Chandi, (1907) 5 Calc, L J 80, also Bishtoo Narain v Gunga (1869) 11 W R 368, and Bhavanishankar v Naranshankar (1899) 23 Bom, 536, of an appellate decree, Gamini v Dharma, (1906) 33 Calc 857, 4 Calc, L J 192

[6] Ganga Das v Takab Ali, (1900) 27 Calc 670

[7] Sreenath Ghose v Roma Nath Sintra, (1898 99) 3 Calc, W N 276 It is difficult to reconcile these two last decisions.

[8] Srimati Nissa v Padha K Mankhya, (1907) 11 Calc, W N 312

The purchaser of property which is at the time of purchase under attachment in *execution of a decree is a representative of the judgment debtor, his vendor*[1] But if an interest comes into existence before the decree, the owner of it is not a representative,[2] so where executors under an order of Court borrowed a sum from A for the funeral expenses of the testator, and the will was set aside by the heir, the latter was held not to be the representative of the executors[3] A purchaser of plaintiff's interest not on the record is not a representative[4] neither is an auction purchaser a representative,[5] but a person attaching a decree represents the decree holder[6] A purchaser by private sale of immoveable property from a judgment debtor is not his representative where the decree is a simple money decree, and creates no charge upon specific property[7] A purchaser from a voluntary seller who has sold with the consent of the Court under O XXI, r 83 *is a representative of the judgment debtor*[8] *A second mortgagee who takes* his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor[9] The Official Assignee is the representative of an insolvent judgment debtor[10] So is a lessee under a lease granted by a judgment debtor while his property was under attachment and in the charge of a Receiver[11]

The Members of a *tarwad* must proceed in execution under this section where a decree has been passed against the *karnavan* in his representative capacity[12] The question whether a person alleged to be a representative of a deceased party to a suit is such representative and also the questions whether property against which execution is sought in the hands of the representative of a deceased party was in fact the property of such deceased party and not the separate *property of the representative are questions to be decided under this* section (244 old code) and not by separate suit[13] When a decree for the sale of specific mortgaged property is being executed it is not open to persons made parties to

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[1] Gur Prasad v Ram Lal (1899) 21 All 20 Lalji Mal v Nand Kishore (189) 19 All 332

[2] Kameshwar Pershad v Run Bahadur (1886) 12 Calc 458 Rash Behary v Surnomoyee (1881) (1896) 1 Calc W N *contra* Purmanandas Mahadaji (1885) 9 B All 1

[3] Fanindro v Jugudishwari (1887) 14 Calc 317

[4] Mohadur Singh v Ram Baghowan (1885) 11 Calc 150 Halodhar v Haro iwa v Srinivasa (1889) 12 Mad 511 94 Jagat Narain v Jag Rup (1883) 5 10 All 1 but see Panchanda v

[5] Shivram v Jivu (1889) 13 Bom 34 Vishvanath v Subraya (1891) 15 Bom 290 Magan Lal v Deshi Mulji (1901) 25 Bom 631 When the interest of a purchaser at a Sheriff's sale is adverse to that of a judgment debtor he is not his representative Ram Narain v Dwarka Nath (1900) 27 Calc 264 4 Calc W N 13 and the auction purchaser is the decree holder's representative Manickka v Rajagopala (1907) 30 Mad 507

[6] Peary Mohun v Romesh (1888) 15 Calc 371 followed in Krishnan v Venkatapathi (1906) 29 Mad 318 Sah Mal Mull v Kanagasabapathi (1893) 16 Mad 20

[7] Madho Das v Ramji Patak (1894) 16 All 286 and Mahabir Prasad v Partab Chand (1900) 22 All 450 As to the mortgagee *of a judgment debtor* subsequent to a decree see Paramanda v Mahabeer (1897) 20 Mad 378 and Tufail v Bitola (1905) 27 All 400

[8] Gobardhan Rai v Bishan Prasad (1901) 23 All 116

[9] Sheo Narain v Chunni Lal (1900) 22 All 243

[10] Miller v Lakhmani Debi (1901) 28 Calc 419 5 Calc W N 761, dissenting from Kashi Prosad v *Miller* (1885) 7 All 252

[11] Mathewson v Gobardhan Tribedi (1901) 28 Calc 492 5 Calc W N 654

[12] Manavittil v Pathiam (1907) 30 Mad., 225

[13] Beni Prasad v Lukhna (1899) 21 All, 323

the execution proceedings as legal representatives of the deceased ... not be contended in those proceedings that the mortgagor was ... made the mortgage and that the decree was one which ought ... been passed.[5]

Relating to the execution of the decree. This section is even ... section 244, but no doubt the Courts will give effect so far as is practicable to the intention of the Legislature to exclude from consideration ... questions relating to the Mesne Profits and interest awarded by the decree. Under an earlier Code, it was held that the corresponding section was ... arising in the enforcement of an existing decree, capable of ... under the ... upon the application of one or other of the parties to ...

... means ... arising,[5] but it should be borne in mind that the purpose ... of this provision is to prevent further and fresh litigation ... matters which really form part of the dispute in an existing suit.[6]

The ... of this provision is, as pointed out in the case of *Ossemonnissa v. Ameeroonnissa*,[6] that the Court having the parties before it in the suit, it is proper that all questions between them relating to the execution of the decree should be determined, and that there should not be the expense of a separate suit to determine such questions. The most liberal interpretation ought to be given to the provision in order to carry out what was the design of the Legislature.[8] This section takes away from the parties the right to raise by a fresh suit any questions as to their rights and liabilities under the decree.[7] Thus the following are within the section; all questions in connection with attachment or sale of property,[8] orders refusing to confirm a sale on the ground that ... was no subsisting decree, ... here of a receiver appointed in an ... oval ... 546 (order XLI, ...) and ... ndet ... ther

[1] Lalchand v. Chatarbhuj (1899) 21 All 277 followed in Khetrapal v. Shyama, (1905) 32 Cal ...
[2] Wahid Ali v. Jamali (1879) 11 B. L. R., ... Subrayalu (1907) 30 Mad., 26
[3] Ram Ghulam v. Dwarka Rai (1885) 7 All 174 per Duthoit J.
[4] See note (2) infra — and in Prosanno Coomar v. Kali Das (1892) 19 Calc., 683 L. R. 19 I. A. 166 ... in dismissing ... Karam, (1885) ... It is of the ... disposed of ... to find that ... language ... discharge o... the decre... suit, is in ... of this sec... to prevent

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[6] Ossemunnissa v. Ameeroonnissa, (1873) 20 W. R., 162
[7] Kisan v. Anandram, (1873) 10 Bom. H. C. 433; Ranganasary v. Shappani (1869-70) 5 Mad. H. C. 375, Fakirapa v. Pandurangapa (1882) 6 Bom. 7. See also Kristo Gobind v. Gaura Pershad (1876) 25 W. R. 372; Lolit Coomar v. Ishan Chunder (1881-2) 10 C. L. R., 258, Nasrudin v. Venkatesh (1881) 5 Bom., 382.
[8] Polokdhari Rai v. Radha Persad (1882) 8 Calc., 28, L. R., 8 I. A. 165, Jogemaya Dasi v. Thackomoni Dassi, (1897) 24 Calc. 473
[9] Doya Moyi Dasi v. Sarat Chunder Mozomdar ... W. N. 656
[10] Mithibai v. Limji (1881) 5 B ... 25 Calc. 175; 1 Calc., (1890) 13 Mad., 338 ... and ...
[11] Ishwargar v. Chudasama, ... da v. Visvalinga,

by the Court which passed it, or to which it was sent for execution [1], or sale by the Court which passes the decree, [2] orders refusing to stay execution, [3] or refusing to allow the legal representative of a deceased decree holder to take out execution without a certificate under the Certificate Act, [4] whether plaintiff is entitled to khas or symbolical possession, [5] or is not entitled to a greater quantity of land sued for, though given by a consent decree, [6] or whether the land taken possession of is included in the decree or not, [7] or that an occupancy holding not transferable by custom cannot be sold in execution of a decree obtained by [illegible] of them, [8] or whether th[illegible] the judgment debtor [illegible] debtor that the value of the property specified in the sale proclamation is inadequate, [10] and where a partition suit between Hindus, the parties, except the mother, entered into a compromise and in execution the mother was dispossessed, her objection was held to fall under this section [11] The question whether defendant is entitled to a right of occupancy, [12] or to a non saleable tenure, [13] or that the decree was fraudulently executed when barred by limitation [14] An order dismissing for default an application by the judgment debtor that the decree is barred by limitation [15] an order under s 87 of the Transfer of Property Act, [16] an order under s 89 of the same Act, [17] an order relating to property dealt with in execution though not forming part of property affected by the decree, [18] or one setting aside a sale, [19] and an order passed after taking an account due to a decree holder under a mortgage, declaring under s 88 of

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[1] Hoti Lal v Hardeo, (1883) 5 All, 212, Ghazidin v Fakir (1885) 7 All, 73, but see Nihal Chand v Rameshari, (1883) 9 Calc, 214 not followed in, (1888) 10 All, 391 (1886) 13 Calc, 112

[2] Kristomohiny v Bama Churn, (1881) 7 Calc, 733

[3] Musaji v Damodardas, (1888) 12 Bom, 279

[4] Hoti Lall v Hardeo, (1883) 5 All 212

[5] Najibun v Taki Khan (1883) 12 C L R, 571 (1883) 9 Calc, 872

[6] Mohibullah v Imami, (1887) 9 All 229

[7] Raghu Nath v Mulna Amad (1888) 12 Bom, 449 as to the propriety of [illegible]

27 Calc 187

[8] Durga Charan v Kali Prosanna (1899) 26 Calc 727 3 Calc W N, 586, followed in Murallah v Birulah (1905) 9 Calc W N 972 Dwarkanath v Tarini, (1907) 34 Calc, 199

[9] Irusappa v Commercial Bank (1900) 23 Mad 377

[10] Ganga Prasad v Raj Coomar Singh, (1903) 30 Calc 617

[11] Sankaravadivammal v Kumarasamya (1878 81) 3 Mad, 473

[12] Ramgopal v Khiali (1884) 6 All 448

[13] Janki Singh v Ablakh (1884) 6 All 393 Ram Gopal v Khiali Ram (1884) 6 All 448 Basti Ram v Fattu (1886) 8 All 146

[14] Najibut Ali v Busseeroollah (1873) 20 W R 5 11 B L R, 42 Zumeer Sirdar v Assemooddeen Sirdar (1875) 23 W R 257 Rangji v Bhaiji, (1887) 11 Bom 57,

[15] Lal Narain v Mahomed Rafiuddin (1901) 28 Calc 81, p 83

[16] Kedar Nath v Lalji (1890) 12 All 61

[17] Oudh Behari v Nageshar (1891) 13 All 278

[18] Appa Rao v Venkataramanayamma, (1900) 23 Mad., 55, Argun v Machchal, (1906) A W N, 233

[19] Makha v Sriram (1902) 24 All. 108 Sonu Singh v Behari Singh (1906) 33 Calc, 283

In other words if the fraud alleged is in the execution proceedings the procedure is under this section, if in the decree, by separate suit [1] When there has been a fraud on the powers of the Court it is doubtful whether any waiver of right by a judgment debtor to object to the sale can affect the Court when asked to set the decree aside [2] and, generally questions whether the decree holder was induced by fraud to withdraw execution [3] or that the debtor attempted to defraud one creditor by getting another to certify a sum not paid [4] or that the decree holder fraudulently executed the decree in opposition to an agreement not to do so, or did so in any fraudulent manner, [5] must be determined under this section

An allegation of fraud against the auction purchaser and not against the decree holder must be determined under this section [6] so must an allegation of fraud against the decree holder and not against the auction purchaser [7] [8] It may not be competent to a Court to set aside the decree of another Court as fraudulent, but it can give relief to the plaintiff in respect of the land which he lost by reason of the sale [9]

Regular suit will not lie —One of the chief difficulties which arose in

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proceedings or by a

if any way at all, to

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under this section can be made only by parties to the suit or their representatives, the first test to be applied to any case arising on this point is whether the persons seeking relief and the proposed defendants are parties or representatives of parties to the existing suit In this connection recollect that the mere fact that some third party will be affected by the decision, does not take the case out of this section [10] If they are not the remedy lies under this section A list of reported decisions on this preliminary question is given on pp *186 189 ante*

The second question is whether the claim relates to the execution, discharge or satisfaction of the decree in question If not again the remedy cannot lie under this section In considering this matter, the general principles as enunciated by the Privy Council and the cases cited on pp *190 191 ante,* should be consulted

It seems clear that one or other of these questions must be answerable in the negative to exclude any given dispute from this section

In the present state of the decisions under section 244, (old code) it would be hazardous for the Editor of a work of this nature to enunciate general principles upon which they may seem to have been arrived at, other than as above stated The best assistance that can be given to practitioners is probably an epitome of the head notes to the reported cases which are divided below under two heads —

This section applies as well to a dispute arising between the parties con-

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[1] Debendra v. Prasanna (1904) 5 Calc L J 328

[2] Dhanukdhari v. Nathima (1907) 11 Cal W N 849

[3] Paranjpe v. Kanade (1882) 6 Bom 148 Sukharam v. Damodar (1895) 9 Bom, 461, Behary Lal v. Kedar Nath (1891) 18 Calc 469

[4] Tarak Chunder v. Dvendra Nath (1883) 12 C L R, 566

[5] Balludeb Lall v. Anadi (1884) 10 Calc 410

[6] Viraraghava v. Venkatacharyar (1882) 5 Mad 217 Rukhinee Bullubh v. Brojonath (1880) 5 Calc 575 Subbaiya Ram v. Srinivasa (1878 81) 2 Mad, 264 but see Ganga Narain v. Tilak Ram (1887 8) L R 15 I A 119

[7] Adharmani v. Monmotha Nath (1901 2) 6 Calc W N 279

[8] Khirod Sundari v. Jnanendra Nath (1901 2) 6 Calc W N, 283. A suit by a party's representative against an auction purchaser, the object of which is to [illegible] a question which properly arose in execution is barred—*Dhani Ram v. Chaturbhuj* (1900) 22 All 86

[9] Kedar Nath v. Prasanna Kumar (1900 1) 5 Calc W N, 579

[10] Prasanna Kumar v. Kali das (1891 2) L R, 19 I A, 166

templated by that section in relation to the execution of a decree after it has been executed as it would to a dispute between such parties relating to the execution of a decree before it had been executed [1] Where a sale in execution was set aside on the application of the judgment debtor, a subsequent suit by him to recover possession was held not to be maintainable [2] Objections that ancestral property of the judgment debtor was not liable to be sold in execution may be made under this section and a separate suit is not necessary [3] When the question is whether the property in dispute belongs to the judgment debtor or to his estate or not, and the question is raised in a proceeding in execution between the parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, the question is one to be determined, in execution, and this section bars a separate suit [4]

A regular suit will not lie to recover money realized on a decree which has been subsequently set aside or reversed on appeal [5] A suit by a decree holder to recover purchase money from the purchaser of property sold in execution will not lie [6] A separate suit will not lie to set aside a compromise and sale,[7] on the ground of fraud[8] or otherwise nor for foreclosure by a mortgagee [9] A regular suit will not lie to restrain a decree holder from executing his decree, when the decree has been satisfied by an agreement out of Court, and such satisfaction has not been certified to the Court [10] or to recover possession of certain property sold in execution of a mortgage decree passed in the presence of the plaintiff who, in the mortgage suit denying the mortgagor s right to mortgage, withdrew his defence [11] or to have it determined whether improvements on land attached in execution of a decree are the property of a deceased judgment debtor, which has come into the hands of his representatives as such or belong to the representatives in their own right [1] In execution of a decree against the *karnavan* of the defendants, certain *tarwad* property was attached On objection by defendants the property was released *Held*, that a suit to cancel the order of release was barred [13] When a sale has been held by a Collector under s 320 (old code) a suit will not lie to set aside the sale on the ground that the property is ancestral and that the sale could not be legally held by the Collector [14] Applications for delivery of possession of property purchased at a Court auction must be made under this section even by assignees of the decree holder's representatives They cannot maintain a separate suit[15] nor can a surety for the decretal amount sue the decree holders for a declaration that they are not entitled to execute a portion of their decree against him [16]

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1 Imdad Ali v Jagan Lal (1895) 17 All 478 Madhu Sudan v Gobinda Pria (1900) 27 Calc 34 4 Calc W N 417

2 Viraraghava v Venkata (1893) 16 Mad 287

3 Krishnama v Arunachalam (1893) 16 Mad. 447 and see cases cited p 196 *supra*

4 Upendra v Ranganatha (1894) 17 Mad 392 See also Trimbak Ram Rao v Covinda (1895) 19 Bom 328

5 Sheodihal v Bhawani (1907) 29 All 348 The proper remedy is by application for restitution in execution Sitan v Bhagwan (1903) 25 All 441

6 Rahim uddin v Ram Lal (1905) 27 All 153 nor for the delivery of the property Kattayat v Raman (1903) 26 Mad, 501

7 Adhar Singh v Sheo Prasad (1902) 24 All 209

8 Durga Kunwar v Balwant Singh (1901) 23 All 478 and see notes vide 'Fraud p 195 *supra*

9 Bansidhar v Gaya Prasad (1902) 24 All 179

10 Azizan v Matuk Lal (1894) 21 Calc 437

11 Ram Chandra v Ranjit Singh (1900) 27 Calc 242 4 Calc W N 405

12 Vengapayyan v Karimpmakal Parvati (1903) 26 Mad 501

13 Kamal Kutti v Ibrayi (1901) 24 Mad, 658

14 Daulat Singh v Jugal Kishore (1900) 22 All. 108

15 Sandhu v Hussain (1905) 28 Mad., 87

16 Linga Reddy v Hussain (1905) 28 Mad. 117

In other words if the fraud alleged is in the execution proceedings the procedure is under this section, if in the decree by separate suit.[1] When there has been a fraud on the powers of the Court it is doubtful whether any waiver of right by a judgment debtor to object to the sale can affect the Court when asked to set the decree aside,[2] and, generally, questions whether the decree holder was induced by fraud to withdraw execution,[3] or that the debtor attempted to defraud one creditor by getting another to certify a sum not paid[4] or that the decree holder fraudulently executed the decree in opposition to an agreement not to do so,[5] or did so in any fraudulent manner,[6] must be determined under this section.

An allegation of fraud against the auction purchaser and not against the decree holder must be determined under this section,[7] so must an allegation of ... purchaser.[8] It may ... r Court as fraudu... which he lost by reason of the sale.[9]

Regular suit will not lie.—One of the chief difficulties which arose in practice under section 244, relates to the question whether relief in any particular case should be sought under this provision in the execution proceedings or by a separate suit. This section as re-enacted has not gone far, if any way at all, to solve this constantly recurring problem. Bearing in mind that an application under this section can be made only by parties to the suit or their representatives, the first test to be applied to any case arising on this point is whether the persons seeking relief and the proposed defendants are parties or representatives of parties to the existing suit. In this connection recollect that the mere fact that some third party will be affected by the decision, does not take the case out of this section.[10] If they are not the remedy lies under this section. A list of reported decisions on this preliminary question is given on pp. 186-189 *ante*.

The second question is whether the claim relates to the execution, discharge or satisfaction of the decree in question. If not again the remedy cannot be under this section. In considering this matter, the general principles as enunciated by the Privy Council and the cases cited on pp. 190-191 *ante*, should be consulted.

It seems clear that one or other of these questions must be answerable in the negative to exclude any given dispute from this section.

In the present state of the decisions under section 244, (old code) it would be hazardous for the Editor of a work of this nature to enunciate general principles upon which they may seem to have been arrived at, other than as above stated. The best assistance that can be given to practitioners is probably an epitome of the head notes to the reported cases which are divided below under two heads:—

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[5] Ballodeb Lall v. Anadi (1884) 10 Cal. 410.

[6] Viraraghava v. Venkatachariar (1882) 5 Mad. 217; Rukhinee Bullubh v. Brojonath (1880) 5 Calc. 618; Subbaji Ram v. Srinivasa (1878-81) 2 Mad. 264; but see ... Narain v. Tilack Ram (1887-8) L. R. 15 I. A. 119.

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[9] K... Nath v. Prosanna Kumar (1900-1) 5 Calc. W. N. 559.

[10] Prasanna Kumar v. Kaldas (1891-2) L. R., 19 I. A., 166.

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A regular suit will not lie to recover money realized on a decree which has been subsequently set aside or reversed on appeal [5] A suit by a decree holder to recover purchase money from the purchaser of property sold in execution will not lie [6] A separate suit will not lie to set aside a compromise and sale [7] on the ground of fraud [8] or otherwise nor for foreclosure by a mortgagee [9] A regular suit will not lie to restrain a decree holder from executing his decree, when the decree has been satisfied by an agreement out of Court, and such satisfaction has not been certified to the Court, [10] or to recover possession of certain property sold in execution of a mortgage decree passed in the presence of the plaintiff who, in the mortgage suit denying the mortgagor's right to mortgage, withdrew his defence [11] or to have it determined whether improvements on land attached in execution of a decree are the property of a deceased judgment debtor, which has come into the hands of his representatives as such or belong to the representatives in their own right [12] In execution of a decree against the *Karnavan* of the defendants certain *tarwad* property was attached On objection by defendants, the property was released *Held* that a suit to cancel the order of release was barred [13] When a sale has been held by a Collector under s 320, (old code) a suit will not lie to set aside the sale on the ground that the property is ancestral and that the sale could not be legally held by the Collector [14] Applications for delivery of possession of property purchased at a Court auction must be made under this section even by assignees of the decree holder's representatives They cannot maintain a separate suit [15] nor can a surety for the decretal amount sue the decree holders for a declaration that they are not entitled to execute a portion of their decree against him [16]

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[16] Linga Peddi v Hussain, (1905) 28 Mad , 117

Regular suit will lie

Agreements prior to decree —The existence and validity of agreements as to costs to be awarded by a decree has been determined in execution proceedings,[1] but this practice has been objected to and dissented from on the ground that the object of such an inquiry is to impugn the decree itself[2] It was said in this last case that cases can only be inquired into under this section (244 former code) when the existence of a decree capable of execution is conceded

Decree set aside —Where a decree has been executed and afterwards set aside or reversed on appeal it has been held that a fresh suit is maintainable for a refund of the purchase money [3] or for the value of property appropriated in execution [4] In this case it was said that the decree had ceased to exist and for that reason the section (244 former code) did not apply Compare these decisions with that of the Allahabad High Court, note (10) p 195 *ante* which appears to be directly in conflict —

Sale set aside —Where a sale has been set aside for irregularity, the auction-purchaser can maintain a suit for recovery of the purchase money [5]

Fraud —A suit will lie to set aside a *decree* on the ground of fraud,[6] and this cause of action is to be distinguished from objections to the *execution* sale see p 195, *ante* vide *Fraud*

Compromise —Where a suit for possession was compromised on an agreement a subsequent suit to execute a kabuliyat in terms of that agreement has been held to be maintainable,[7] and a suit lies for breach of an agreement not to execute a decree [8] or to prove an adjustment out of Court which could not be taken cognizance of under sec 258 (O XXI, r 2)[9] or upon a deed executed under a decree [10]

An order passed against a person who at the instigation of the judgment-debtor [illegible] does not bar a [illegible] in the name of [illegible] name had been [illegible] endant was only his *benamidar*, is not barred by this section [12] A suit for partition will lie at the instance of a plaintiff who has purchased a share of a property at a sale in execution of a decree, and who has been obstructed in obtaining possession by some of the judgment debtors [13] This section does not bar a suit to establish the liability of ancestral property in the hands of sons to satisfy their father's debts [14] This section does not bar a suit for contribution brought by one of two

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[1] Laldas v Kishordas, (1898) 22 Bom, 463, distinguished in Benode Lal v Brajendra, (1902) 29 Calc, 810

[2] Hassan Ali v Ganzi Ali Mir, (1904) 31 Calc, 179 See also Ponnambala v Sivagnama, (1894) 18 Mad, 343, L. R., 21 I. A, 71

[3] Hira Lal v Gour Moni, (1886) 13 Calc, 326

[4] Coffin v Karbari Rawat, (1893) 20 Calc, 501

[5] Jotindra Mohun Tagore v Mahomed B Chowdhury, (1905) 32 Calc, 352.

[6] Khagendra Nath v Prannath, (1902) 6 Calc. W N, 473, a case of an *ex parte* decree

[7] Chuni Lal v Hira Lal, (1903) 7 Calc W N, 158

[8] Hanmant v Subbabhat (1899) 23 Bom, 394 See also Murigeya v Hyat Saheb, (1899) 23 Bom., 237.

[9] Iswar Chandra v Harish Chandra (1898) 25 Calc, 718, 2 Calc W N, 247.

[10] Matangini v Chooneymoney, (1895) 22 Calc 903.

[11] Bishendyal Singh v Sagar Singh (1897 8) 2 Calc W N 311

[12] Gour Mohan v Dinonath Karmakar (1897 8) 2 Calc. W N, 76, 25 Calc, 49

[13] Nagamuthu v Savarimuthu, (1892) 15 Mad, 226

[14] Ramayya v Venkataratnam (1894) 17 Mad, 122 Arunchala v Sivagiri Zemindar, (1894) 7 Mad., 328 See also note (3) p. 197, *ante*.

judgment debtors who has been compelled to satisfy the decree in full against the other joint debtor,[1] nor a suit for possession by the purchaser at a Court sale of a share of an undivided member of a joint family[2]

When an issue arising out of the execution of decree has not been raised and determined under this section a defendant in a separate suit subsequently [illegible] 21 of Bengal Act I of [illegible] regular suit may lie to [illegible] a Collector under the [illegible]

Symbolical possession—Where a person takes symbolical possession by mistake, a suit for *khas* possession will lie.[5]

Mortgage—A having obtained a decree against a widow on a mortgage-bond, applied to execute it against B, the reversioner, as her legal representative B denied that he was her representative and the Judge, instead of deciding the point, put B on the record, directing that the dispute should be decided in a regular suit, *held*, that B could bring a suit to have it declared that the decree only bound the widow's estate[6] Two heirs of a Mahomedan woman took possession on her death of certain immoveable property left by her to the exclusion of the third heir, her sister They mortgaged their property The mortgagee brought a suit and obtained a decree for a sale After decree one of the mortgagors died and his sister was brought upon the record as his representative The property was sold and subsequently their sister brought a suit against the auction purchaser for recovery of her share of the mortgaged property *Held*, that sec. 244 (former Code) did not apply and that the suit was maintainable[7] A second mortgagee, party to a foreclosure suit, must bring a separate suit to work out his rights against other incumbrancers[8] Where a mortgagee in suing on his mortgage included in his plaint certain property not included in the mortgage deed, held, that this section did not conclude the defendant from subsequently suing to recover the property so wrongly included[9]

Where a decree for redemption directed that if payment was not made within the time fixed, the judgment shall be deemed to be non existent and the plaintiff did not pay within the time fixed, it was held that a second suit for redemption was not barred[10] A suit will lie to set aside a sale of trust property in execution of a money decree against the plaintiff in his private capacity[11]

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[1] Ram Saran v Janki Pande (1896) 18 All 106

[2] Telumalai v Saminvasi, (1906) 29 Mad, 294

[3] Nil Kamal v Jahnabi, (1899) 26 Calc, 946, Durga Charan v Karmat Khan, (1902 3) 7 Calc W N, 607

[4] Raghubans v Phool Kumari (1906) 32 Calc, 1130 Janki Das v Ram Golam Sahu (1901 2) 6 Calc W N, 331, 28 Calc, 813 and see Jathavedan v Kincha (1907) 30 Mad, 72.

[5] Shama Charan v Madhub Chandra (1885) 11 Calc, 93, followed in Hassan Raja v Kailas Chandra (1902 3) 7 Calc W N, cc, but not when he takes it deliberately, Kristo Gobind v Gunga Pershad (1876) 25 W R, 372

[6] [illegible] followed in Gourmoni v [illegible] (1890) 17 Calc, [illegible] to in Ramunni v [illegible]

[7] [illegible] followed in Khetr[illegible] [illegible] 20 All, 506

[8] Gopi v Binsidhar, (1905) 2 Calc L J, 173, 9 Calc W N, 577.

[9] Ram Chunder v Kondo, (1900) 22 All, 442

[10] Sita Ram v Madho Lal, (1902) 24 All, 44

[11] Ram Krishna v Padma Charan Deb (1901 2) 6 Calc. W. N, 663, followed in Amar Chand v Nani Gopal, (1908) 12 Calc, W N, 308, and see id. 310.

Regular suit will lie

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Compromise —Where a suit for possession was compromised on an agreement a subsequent suit to execute a kabuliyat in terms of that agreement has been held to be maintainable ,[7] and a suit lies for breach of an agreement not to execute a decree ,[8] or to prove an adjustment out of Court which could not be taken cognizance of under sec 258 (O XXI, r 2)[9] or upon a deed executed under a decree [10]

An order passed against a person who at the instigation of the judgment-debtor has obstructed the decree holder in obtaining possession does not bar a [illegible] hased in the name of [illegible] own name had been [illegible] defendant was only [illegible] artition will lie at the instance of a plaintiff who has purchased a share of a property at a sale in execution of a decree, and who has been obstructed in obtaining possession by some of the judgment debtors [13] This section does not bar a suit to establish the liability of ancestral property in the hands of sons to satisfy their father's debts [14] This section does not bar a suit for contribution brought by one of two

[1] Laldas v Kishordas, (1898) 22 Bom , 463, distinguished in Benode Lal v Brajendra, (1902) 29 Calc , 810

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[3] Hira Lal v Gour Moni, (1886) 13 Calc , 326

[4] Coffin v Karbari Rawat, (1893) 20 Calc , 501

[5] Jotindra Mohun Tagore v Mahomed B Chowdhury, (1905) 32 Calc , 352

[6] Khagendra Nath v Praunath, (1902) 6 Calc. W N , 473, a case of an *ex parte* decree

[7] Chuni Lal v Hira Lal, (1903) 7 Calc W N , 158

[8] Hanmant v Subbabhat (1899) 23 Bom , 394 See also Murigeya v Hyat Saheb, (1899) 23 Bom , 237,

[9] Iswar Chandra v Harish Chandra, (1898) 25 Calc , 718 , 2 Calc. W N , 247.

[10] Matangini v Chooneymoney (1895) 22 Calc , 903

[11] Bishendyal Singh v Sagar Singh, (1897 8) 2 Calc W N , 311

[12] Gour Mohan v Dinonath Karmakar, (1897 8) 2 Calc. W N , 76 , 25 Calc , 49

[13] Nagamuthu v. Savarimuthu, (1892) 15 Mad , 226.

[14] Ramayya v Venkataratnam, (1894) 17 Mad., 122 Arunchala v Sivagiri Zemindar, (1884) 7 Mad., 328 See also note (3) p 197, *ante*.

time prescribed in a decree for redemption is appealable under this section [1] So is one disallowing the objection by a judgment debtor that the value of the property specified in the sale proclamation is grossly inadequate [2] A case may come under this section an' one under another section [3] of a house standing on lan against an order passed in execution of a decree under section 9 of the Specific Relief Act [5] An order that a sale shall be proceeded with is appealable [6] An order on an application to deposit a landlord's fee, and for confirmation of sale and the grant of a sale certificate is an order under this section and subject to appeal and second appeal [7]

Second appeal Subject to the provisions of section 100 a second appeal lies from orders under this section

lu for the judgment debtor in an of the Bengal Tenancy Act a second made on the application, as it is an e) [8] So also a second appeal lies, when after the confirmation of the sale of a permanent tenure, the judgment debtor objects to the purchaser being put into possession on the ground that the sale is invalid for non payment of landlord's fee under sec 13 of the Bengal Tenancy Act [9] An auction purchaser has a right of second appeal in a case for setting aside a sale in execution of a decree, when the judgment debtor alleges fraud on the part of the decree holder or auction purchaser, for the case is one under this section (244 former code)[10] but not upon a mere allegation of fraud, without any attempt to substantiate it [11]

Limitation —The provisions of the Limitation Act XV of 1877, regarding several questions relating to the execution of decrees, should be borne in mind See Sch II of that Act, articles 165, 166, 167, 172, 173A, and 174

An application to set aside a sale on the ground of the fraud of the decree-holder and auction purchaser comes under art 178 of the Limitation Act [12] Where a plaint is treated as an application under this section (244 former code) art 178 of Sch II of the Limitation Act is applicable [13]

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[1] Rango v Bhomshetti, (1902) 26 Bom 121

[2] Ganga Prasad v Raj Coomar Singh (1903) 30 Calc, 617, Phulchand v Nursing Pershad, (1901) 28 Calc, 73, Murlidhar v Ananda Rao, (1901) 25 Bom, 418 But see Magan Lal v Doshi Mulji, (1901) 25 Bom, 631

[3] Ram Narain Sahoo v Bandi Pershad (1904) 31 Calc, 737

[4] Ram Adhar v Narain Das, (1902) 24 All, 519

[5] Souza v Gulam Moidin Beari, (1903) 26 Mad, 438

[6] Sivasami v Ratnasami, (1900) 23 Mad, 568

[7] Krishna Chandra v Anukul Chandra (1901 2) 6 Calc W N, 190

[8] Chand Monee v Santo Monee (1897) 24 Calc 707, 1 Calc W N, 534

[9] Mohim Chandra v Ram Lochan, (1902 3) 7 Calc W N, 591

[10] N

[11] Umakanta v Dinonath, (1901) 28 Calc, 4, 5 Calc W N, 124

[12] Bhuban Mohun v Peary Mohun, (1898 9) 3 Calc W N, lxxx

[13] Lalman Das v Jagan Nath, (1900) 22 All, 376

Damages for Trespass —A suit will lie by the auction purchaser for damages for injury to property by the judgment debtor or by *strangers* Such a claim cannot be enforced in execution proceedings[1]

Declaratory decree —If the nature of the suit or the matter complained of is such as cannot be decided in execution or is not directly connected with carrying out a suit will lie This if a decree is merely declaratory and not capable of being carried out in execution it may be enforced by a regular suit But if a decree is not merely declaratory it can be enforced in execution under this section

Jurisdiction —Where a suit is instituted in the Court which had jurisdiction to execute the decree the plaint may be treated as an application under this section and the suit need not fail for want of jurisdiction[4]

Estoppel —A petition to postpone a sale cannot be treated as an estoppel binding the judgment debtor if the proceedings are irregular[5] and an order staying proceedings does not prevent the debtor from pleading limitation afterwards the first Court[6]

Appeal Orders under section 244 were appealable if final[7] but not interlocutory orders[8]

Under this Code the word decree is defined[9] to include the determination of *any question within this section 47 except such adjudications for which an* appeal lies as from an order

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Other adjudications in proceedings under this section will be appealable as decrees if they otherwise satisfy the definition They need not be *final* as was the former rule but must *conclusively determine the rights of the parties* An order subsequent to decree appointing a commissioner to make a partition was not appealable under the former Code[10] and would probably fail to pass as a Decree under this Code

Orders must be within section —It is upon this point that most of the reported cases on the question of appeal turn Endeavours are constantly made to
a right of appeal[11] Orders
rtificate are not appealable An
time for payment of the mort
An order refusing to enlarge the

K l t K l t a (1908) 31 Mad 37 see Ka le Ki lore t N oor Khan (186) 7 W R 45

[2] J m tl t B l n l I N W P I t V 9 ed 1869 p 154 ed 18 3 1863) 1 All H C 1

[3] M d r t I an r o (1898) 2 L 5

[4] I t l Kotl n la (19) Mad 6 but see B ra Mal ata t Sl yan a C Kl sw (190) 2 C le 4 3 Jl an m Lall t Kewal I a (1900) All I l a l l y sub t n tl C urt gives full l cret n t tl s matter saying l j t s a t L n tat n.

[5] M n ko n r J out (1884) 1 C le 196 L. R. 10 I A 119

[6] S r ry Mu l l r M r r 1856) 13 C le

[7] N l l a l r Ra e l n (1883) 9 C le 914

[8] L l r Lal t K lar Natl (1891) 18 C le 469

[9] S ( ) a e

[10] J l r r K l l C l r (18) 4 Cal

[10] O K eal s C I Code 6tl Ed p 43 et seq

[11] B j a R r I n K n r (1899) 26 C le 5 9 3 C le W N 3 4

[12] Kul l K nwar r I n Dhar (1901) 23 All 4 6

[13] Pal n N p l P (189) 14 All 50

time prescribed in a decree for redemp[illegible]on is appe[illegible] is one disallowing the objection by a j[illegible] perty specified in the sale proclamat[illegible]on is [illegible] come under this section and an appeal [illegible] one under another section [3] No appeal l[illegible]es from a[illegible] of a house standing on land sold in exec[illegible] [illegible]

Second appeal Subject to the provisions of sect[illegible] lies from orders under this section

[illegible] for the [illegible], of the Bengal Tenancy [illegible] made on the app[illegible] e)[8] So also a [illegible] a permanent te[illegible] debtor objects to the purchaser being put into possess[illegible]on on the [illegible] the sale is invalid for non payment of landlord s fee under sec 13 of the [illegible] Tenancy Act [9] An auction purchaser has a right of second [illegible] for setting aside a sale in execution of a decree, when the j[illegible] alleges fraud on the part of the decree holder or auction purchaser, [illegible] case is one under this section (244 former code)[10] but not upon a [illegible] allegation of fraud, without any attempt to substantiate it [11]

Limitation—The provisions of the Limitation Act XV of 1877, [illegible] several questions relating to the execution of decrees, should be borne in mind See Sch II of that Act, articles 165, 166, 167, 172, 173A, and 174

[1] Rango v Bhomshetti, (1902) 26 Bom, 121

[2] Ga[illegible] [illegible] v Naru[illegible] Bom, 41[illegible]

[3] Ram Narain Sahoo v Bandi Pershad, (1904) 31 Calc, 737

[4] Ram Adhar v Narain Das, (1902) 24 All., 519

[5] Souza v Gulam Moidin Beari, (1903) 26 Mad 438

[6] Sivasami v Ratnasami, (1900) 23 Mad., 569

[7] Krishna Chandra v Anukul Chandra (1901 2) 6 Calc W N, 190

[8] Chand Monee v Santo Monee, (1897) 24 Calc 707, 1 Calc W N, 531

[9] Mohim Chandra v Ram Lochan, (1902 3) 7 Calc W N, 591

[10] N[illegible]

[11] Umakanta v Dinonath, (1901) 28 Calc, 4 5 Calc W N, 124

[12] Bhuban Mohun v Perry Mohun, (1898 9) 3 Calc W N, lxxx

[13] Lalman Das v Jagan Nath, (1900) 22 All, 376

LIMIT OF TIME FOR EXECUTION

48 (*1*) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

Execution barred in certain cases

(*a*) the date of the decree sought to be executed, or,

(*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

(2) Nothing in this section shall be deemed—

(*a*) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment debtor has by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application or

(*b*) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877

Act XIV of 1882, Sect 230, third and fourth paras

Not an Injunction —Decrees of every kind except those granting an injunction are covered by this section This eliminates the discussion that occasionally arose under Act XIV of 1882 regarding the precise meaning of the term decree for payment of money or delivery of other property [1]

[illegible] r II com n of on is

Steps in aid of execution —The following applications and steps subsequent to decree have been held not to amount to steps in aid of execution —

[1] See O Kinealy s C P Code 6th Ed p 389

[2] Chunder Coomar v Bhogobutty (1878) 3 Calc 235

[3] Prabhacaran v Lotannah (1878) 2 Mad 1

[4] Deb Narain Dutt v Narendra Krishna (1889) 16 Calc, 270, Ishvardas v Dhanjisha (1892) 16 Bom 644

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for execution,[2] for time[3] ... t of ... of the decree filed ... nor the granting of ... stpone a sale and to ... f sale,[10] an appeal from an order made in the course of proceeding in execution.[11] An application to execute a decree for interest on the principal sum awarded and cost against a surety who had not made himself liable for interest or costs is not an application to take a step in execution so as to keep the order alive as against the principal debtor,[12] nor one to give time for the satisfaction of the judgment-debt,[13] a payment out of Court of money collected by a receiver,[14] an application preferring objections to the execution of another's decree under circumstances as mentioned in Shib Lal v. Radha Kishen,[15] in which it has been held that the Limitation Act requires that the decree-holder should make a direct and in-

...

judgment debtors has not the effect of keeping the decree alive as against the other judgment debtors.[19]

Do amount to

But the following do so amount to a step in aid of executions:—

An application to constitute a step in aid of execution may be made verbally.[20]

An application by the judgment creditor to the Court which passed the decree for a certificate that a copy of the Revenue Register of land is necessary to

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[1] Ananda v. Harasundari, (1896) 23 Calc., 196; Parbati Dai v. Sham Soondar Rai, (1897 8) 2 Calc. W. N., cxxiv; Aghore Kali v. Prasonno Kumar, (1895) 22 Calc., 827.

[2] Gopilandhu v. Domburu, (1888) 11 Mad., 336.

[3] Kartick Nath v. Jugger Nath, (1900) 27 Calc., 285.

[4] Dwarkanath v. Anandrao, (1896) 20 Bom., 179; Trimbak v. Kashi Nath, (1898) 22 Bom., 722; Thakur Ram v. Katwaru Ram, (1900) 22 All., 358.

[5] Ranga Chariar v. Balaramasami, (1898) 21 Mad., 400.

[6] Rajaram v. Banarji, (1899) 23 Bom., 311; Aghore Kali v. Prasonno Kumar, (1895) 22 Calc., 827.

[7] Daya Kishan v. Nanhi, (1898) 20 All., 304.

[8] Kallu Rai v. Fahiman, (1891) 13 All., 124.

[9] Abdul Hossein v. Fazilun, (1893) 20 Calc., 255.

[10] Umesh Chandra Das v. Shib Narain Mondul, (1901 5) 0 Calc. W. N., 191.

[11] Nand Kishore v. Sipai Singh, (1904) 26 All., 608.

[12] Kusaji v. Vinayak, (1899) 23 Bom., 478.

[13] Barrow v. Javerchund, (1896) 19 Mad., 67.

[14] Appasami Naickan v. Jotha Naickan, (1899) 22 Mad., 418.

[15] Shib Lal v. Radha Kishen, (1885) 7 All., 898.

[16] Akbar v. Kali Krishna Nandi, (1899 1900) 4 Calc. W. N., cli.

[17] Pandarinath v. Lila Chand, (1889) 13 Bom., 237.

[18] Gunga Pershad v. Debi Sundari, (1885) 11 Calc., 227; Madho Prashad v. Kesho Prasad, (1897) 19 All., 337.

[19] Harendra Lall v. Sham Lall, (1900) 27 Calc., 210.

[20] Trimbak v. Kasinath, (1898) 22 Bom., 722. See also Manek Lal v. Nanla, (1891) 15 Bom., 405.

enable him to get a copy from the Collector's office and thereupon execute his decree,[1] an application for the attachment of a judgment debt, though dismissed for non payment of process charges[2] a request for the payment of money realised in satisfaction of decree[3] an application to be put in possession of property purchased at an auction sale,[4] an application for execution of a portion of a decree though not in accordance with law,[5] an application for leave to bid at the sale of the judgment debtor's moveable property[6] an application for payment of money paid into Court on the decree holder's account an application for execution of a decree which has been attached and one for the execution of a decree which the decree holder has himself attached in execution of his decree[8] an application by the son of a deceased decree holder to be made a party to the record and to be allowed to continue the execution proceedings and an application for the issue of a notice to the heir and legal representative of the judgment debtor to show cause why the decree should not be executed against him[9] an application made by the party entitled to make it but in which by mistake a deceased judgment debtor is named as the person against whom execution is sought,[10] an application to strike off a pending application for execution with liberty to bring a fresh application for execution of the same decree[11] an application for the transfer of a decree to another Court for execution,[12] an application to a Court to certify a payment out of Court,[13] an application for execution by sale of mortgaged property under an agreement filed in Court under s 44 of the Dekhan Agriculturists Relief Act,[14] an application for the sale of attached property[15] an application to allow the sale of the attached property subject to the mortgage of the claimant[16] an application by the transferee of a decree for the sale of the hypothecated property[17] an application for the rejection of a petition of the judgment debtor for setting aside the sale of his property and for confirmation of sale[18] an application for review of an order striking off an execution case and for its restoration to the file[19] an

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1 Kunhi v Seshagiri (1882) 5 Mad 141

2 Kerala Varma v Shangaram (1893) 16 Mad 452

3 Koormiyya v Krishnamma (1894) 17 Mad 165 Hem Chandra v Braja Sundari (1882) 8 Calc 89 Fazal Imam v Motti Singh (1884) 10 Calc 549

4 Moti Lal v Makund Singh (1897) 19 All 477 Sarutorllah v Rajkumar (1900) 4 Calc W N 681 27 Calc 709 see also Lakshmanan v Kamatamal (1901) 24 Mad 185

5 Dulichand v Shivkor (1891) 15 Bom 142 Kahdas Munchand v Varjivan Pargji (1891) 15 Bom 245

6 Vinayakrao v Vinayak Krishna (1897) 21 Bom 371 see contra Raghunundun v Kally Dut (1896) 23 Calc 690

7 Babuchand v Mugutrao (1898) 22 Bom 340

8 Adhar Chandra v Lal Mohun (1897) 24 Calc 778 1 Calc W N, 676

9 Keshavlal v Pitamber Das (1895) 19 Bom 261, Adhar Chandra v Lal Mohun (1897) 24 Calc, 778 1 Calc W N 676

10 Samia v Chockalinga (1894) 17 Mad 76

11 Ram Narain v Bakhtu Kuar (1894) 16 All, 75 see *contra* Tarak Chunder v Gyanada Sundari (1896) 23 Calc 817

12 *Chandra Nath v Gurroo Prosunno* (1895) *22 Cal, 375* or to retransfer Chandra Nath Nag v Bhuda Chandra Lai (1898) 2 Calc W N cclxxi

13 Ghansham v Mukha (1[illegible] [illegible] All 60 Sujan Singh v I[illegible] Ram Sarup (1889) 9 A[illegible] 608, Wasi Imam v [illegible]

14 Bhagwan v Canu (1899) 23 Bom 644

15 Manek Lal v Nasia (1891) 15 Bom 405

16 Lalradhi v Kali Chand (1888) 15 Calc 303

17 Abdul Majid v Muhammad Faizullah (1891) 13 All 89

18 Chand Pershad v Durga Lal (1894) 21 Calc, 23

19 Kartick Nath v Juggur Nath (1900) 27 Calc, 285

application that a sum of money in the custody of a Government department may be sent for and paid to the applicant,[1] and an application for partial execution of a decree,[2] are all applications to take a step in aid of execution An application under (s 248 old code) Order XXI, r 21 even if defective as an application for execution, is an application for a step in aid of execution and keeps the decree alive[3] An application for the issue of a notice under the same rule is a step in aid of execution[4]

Form of application —See Order XXI, rr 10 and 25 and notes thereto —

Limitation —Execution, being a proceeding to enforce a decree comes under the head of purely adjective law and the law, of limitation prevailing at the time of the application must govern it[5]

Limitation begins to run from the date of the final decree in the suit[6] The period of limitation for execution of a decree for sale under s 88, Act IV of 1882, runs from the date of the granting of an order absolute for sale without which order the

proceedings against the person and other property of the judgment debtor will be
aside an *ex parte* decree has been rejected
of the *ex parte* decree runs from the date of
pable of execution and has to be amended,
s amendment[10] So, too, in the case of an
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holder[12] Where a decree was for possession of immoveable property, but its execution was contingent on default being made by the judgment debtor in the payment year by year of a certain annuity to the decree holder *held*, that the decree holder was not obliged to execute such decree once and for all upon the occurrence of the first default, but might execute it on occasion of any subsequent default[13]

Minor —When the person entitled to make an application for execution of a decree is a minor at the time from which limitation is to be reckoned, s 7 of the Limitation Act saves the execution of the decree from being barred, and any application made by his guardian on his behalf is also exempt from the operation

[1] Venkata Pamanamma v Purushottam (1901) 24 Mad 188

[2] Nepal Chundra v Amrita Lall (1899) 26 Calc, 888

[3] Gopal Chunder Manna v Gosain Das Kalay (1898) 25 Calc 594 Dhonkal Singh v Phakkar Singh, (1893) 15 All, 84

[4] Keshavlal Behai v Pitambardas (1895) 19 Bom 261

[5] Pasu Pati v Pasu Pati (1876) 1 Mad 52

[6] Badunnissa v Shamsuddin (1895) 17 All 103 Gopal Chunder v Das Kolay, (1898) 2 Calc W N 536 Mohomed v Mohini (1907) 34 Calc 874

[7] Mahabir Prasad v Sital Singh (1897) 19 All 520

[8] Chandi Charan Roy v Ambika Charan Dutt (1904) 31 Calc, 792

[9] Jivaji v Ram Chandra (1892) 16 Bom, 123

[10] Muhammad Suleman v Muhammad Yar, (1895) 17 All, 39

[11] Fakir Mahammad v Ghulam Husain, (1876) 1 All, 580, Sarat Kumari v Jagat Chandra, (1896) 1 Calc W N, 260, Trimbak v Kashinath, (1898) 22 Bom, 722

[12] Wali Alum v Doomirat, (1896 7) 1 Cal W N, clxii

[13] Muhammad Islam v Muhammad Ahsan, (1894) 16 All, 237 See also Kuppu Ammal v Saminatha (1895) 18 Mad, 482

of limitation [1] A petition filed on behalf of a minor, admitting liability and accompanied by part payment of the decretal amount prevents execution from being barred [2]

Court closed—Where parties are prevented from doing anything on a particular day not by any act of their own but by the act of the Court itself, they are entitled to do it on the first opportunity [3]

Partition—A decree for partition determines the right of all the parties, and if one party applies for execution, no other party need apply,[4] but in regard to limitation, it must be looked on as a joint decree [5]

Rent decree—A rent-decree can be executed personally against the Judgment-debtor [6]

Striking off—Decreee holder whose application for execution has been struck off after attachment of property may apply again [7] It is clear both from the Code of Civil Procedure itself, and from the Limitation Act, that a succession of a first application for execution ly again having been expressly his previous application affords on an application for execution, striking off the application but maintaining attachment effected in pursuance thereof, is an order not warranted by law [9] An appeal against an order striking off an application for execution is superfluous and must be dismissed [10]

Remedies—If a Court omits to decide the question of limitation, or decides it against the judgment debtor and in his opinion wrongly, he can appeal or apply for review, and this whether notice of the application was issued to him or not [11]

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[1] Norendra Nath v Bhupendra Narain (1896) 23 Calc 374 See also Surja Kumar v Arun Chander, (1901) 28 Calc, 465 Zamir Hasan v Sundar (1900) 22 All, 199

[2] Norendra Nath v Bhupendra Narain, (1896) 23 Calc, 374

[3] Peary Mohun v Anunda Charan, (1891) 18 Calc, 631, Ramsahai v Gaya, (1885) 7 All, 107, Sambasiva v Ramasami, (1899) 22 Mad, 179 See s 5 of Act XV of 1877

[4] Khoorshed Hossein v Nubbee Fatima (1878) 3 Calc, 551, see, however, Hikmat Ali v Wahunnissa, (1890) 12 All, 506.

[5] Mohun Chunder v Mohesh Chunder, (1883) 9 Calc, 568.

[6] Bhabani Charan v Pratap Chandra, (1903 4) 8 Cal W N, 575

[7] Lakshmi Narasimha v Atchanna, (1892) 15 Mad, 240, Chintaman v Balshastri, (1892) 16 Bom, 294, Dhonkal Singh v Phakkar Singh (1893) 15 All, 84, as to the effect of striking off an application granted, see, Barada Sundari v Fergusson, (1883) 11 C. L. R., 17, Biswa Sonan v Binuda, (1884) 10 Calc, 416; Syam Singh v Budyanath, (1883) 13 C L R, 176; Raghubans Gir v Sheosaran, (1883) 5 All, 243, Venkatrav v Bijesing, (1886) 10 Bom, 108

[8] Thakur Prosad v Fakirullah (1894 5) I. R, 22 I A, 44, Jit Mal v. Jwala v Pirthi Pal, (1893) 15 All, 49

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[12] 425—As to an application after v Ghanishamlal, (1881) 5 Bom, 29, Krishnaji v Anandrav, (1883) 7 Bom, 293, Bati Begam v Nihal Chand, (1883) 5 All 459, Lutful Huq v Sumbhudin, (1882) 8 Calc, 218

[13] Rahim Ali v Phul Chand, (1893) 18 All, 482, Sasivarna v Arulanandam (1898) 21 Mad 261 But see Har Sarup v Balgobind, (1890) 18 All, 9.

execution proceedings were stayed beyond the period of limitation by an objec
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Where a decree holder was relegated to a fresh suit, a petition to execute the original decree which was dismissed before the suit was instituted could not be revived after more than three years [3]

Appellate decree—Limitation runs from the date of the appellate decree and not from the original decree even if the decree is only partially appealed against [4] But where an appeal is rejected on account of its being insufficiently stamped, limitation runs from the date of the decree appealed against [5]

The term ' appeal includes an appeal to the Privy Council and limitation runs from the date of the order of the Judicial Committee [6]

Limitation Act—Section 13—S 13 by which the time during which a defendant has been absent from British India is excluded, does not apply to execution proceedings [7]

Section 19—S 19 of that Act applies to applications in execution in Calcutta [8]

Certain date—A decree directing payments to be made annually or monthly is not a decree directing payment at a certain date within the meaning of this section,[9] but if the date can be made certain on construction, it is suffi

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[1] Desraj Sing v Karam Khan (1897) 19 All 71

[2] Shivram v Sarasvatibai (1896) 20 Bom 175 In the following cases however

[3] Suryanarayana v Gurupada (1898) 21 Mad 257

Redemption —See Narayan Anandra v 16 Bom 480 Ramunni v Brahma 15 Mad 366

[4] A e also Gopal Chunder 556 Kristo Churn rajmohan (1896) 23 Calc 598, Narsing mmad Hasan (1886) 1 14 Imam Ali v Lubit Sing (1883) 9 Calc 100 Viraraghava v Ponnammal (1899) 23 Mad. 60 Muthu v Chellappa (1889) 12 Mad 479 which case has been however practically overruled by a recent decision of the Madras High Court *vi*~ Kristnama v Mangammal (1903) 26 Mad 91

[5] Dianatullah v Wajid Ali (1884) 6 All 438

[6] Gopal Sahu v Joyram (1881) 7 Calc 670 Narsingh v Narain (1879 80) 2 All. 763 Kristnamma v Mangammal (1903) 26 Mad. 91

[7] Ahsan Khan v Ganga Ram (1880 81) 3 All. 185

[8] Toree Mahomed v Mahomed (1883) 9 Calc 730 Bhagabutty Charan v Ashutosh Chattopadhya (1903 4) 8 Calc W N 470 in Allahabad—Rambhit Rai v Satgur (1880 81) 3 All 247 Hingan Lal v Mansa Ram (1896) 18 All. 384 but not in Madras—Rama v Venkatesa (1887) 5 Mad 171

[9] Yusuf Khan v Sirdar Khan (1884) 7 Mad 83 Sabhanatha v Lakshmi (1884) 7 Mad 80

cient [1] And where a debtor on being arrested petitioned to have fifteen days to pay and the petition being agreed to, an order "Let the petition be filed" was passed it was held not an order to pay at the end of fifteen days [2]

Fraud —Preventing [3] or evading arrest seems sufficient to constitute fraud [4] Where a judgment debtor knowing that a warrant of attachment had been issued against his moveable property, locked up his house and so prevented the moveable property therein from being attached *held*, that his action amounted to fraud In order to obtain the benefit of the proviso in that section, it is not necessary that a judgment creditor should prove that the fraud of the judgment debtor continued so as to prevent execution of the decree at any time [5]

The term "application to execute a decree" means any application to execute a decree It is not confined to the last application preceding the expiry of the period of 12 years from either of the points of time mentioned in cl (*i*) or cl (*ii*) of the same paragraph [6]

Res judicata —The decision of a Court in execution is *res judicata* between the parties and where a Court rejects an application as barred, no subsequent application can be allowed [8] barred having been presented after time quently struck off for default a second hand where execution has been ordered application impeach the result of the first [10]

A judgment debtor who did not appeal against a previous order for execution of a portion of the decree and did not dispute the validity of such order, cannot in a subsequent execution of the remaining portion of the decree contend that the first application was not in accordance with law, and that the subsequent application is consequently barred by limitation [11]

In the case of Delhi and London Bank v Orchard [12] it was decided that, as the necessary sanction of the Commissioner had not been obtained, an order refusing to execute was not a *res judicata* and relying on this it has been held that an order refusing an application to execute is not an adjudication within

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[1] Kavari v Venkamma (1891) 14 Mad 306 Lakshmibai v Madhavrav (1888) 12 Bom 65

[2] Jagatchandra Das v Hari Pawoot (1889) 16 Calc 16 Balchand v Baghunath (1882) 4 All 155 see however Jhoti Sahu v Bhulan Cu (1885) 11 Calc 143 See INSTALMENTS O XX r 11 SUBSTANTIAL COMPLIANCE *ib*

[3] Bhau Jethu v Malek (1885) 9 Bom 318 Visalatchi v Sivasankara (1882 4 Mad 292

[4] Pattakara v Rangasami (1883) 6 Mad 365

[5] Venkayya v Raghava (1899) 22 Mad 320

[6] Tileshar Pat v Parbati (1893) 15 All 198

[7] [illegible] R 8 I A 123 Ram [illegible] A 37, Kanji Mal v [illegible] 4) L I, 11 I A 181, [illegible], but see Rup Kuari [illegible]

[8] Pinkey Karim v Ramesh Chunder (1882) 11 C L R 145, 9 Calc, 65, see also Phoolkoomari v Jhoraj Singh (1882) 11 C L R 277

[9] Bhagwan v Dhondi (1898) 22 Bom 83

[10] Dulichand v Shankar (1891) 15 Bom 242 Manjunath v Venkatesh (1882) 6 Bom 54 Hurrosoondari v Jnnoolunbhoo (1881) 6 Calc, 233 But see Dinkar v Hari (1890) 14 Bom, 206

[11] Nepal Chandra v Amritalall (1899) 26 Calc 848

[12] Delhi and London Bank v Orchard (1878) 3 Calc 47, L R 4 I A, 127, and see Manjunath v Venkatesh (1882) 6 Bom, 54

the rule [1] When an application for execution had not been proceeded with, pending a second appeal from the decree a second application after the second appeal was dismissed was held not to be barred There is no *res judicata*, when the relief claimed in the two applications is different [3]

Construction —A construction put upon a decree in execution proceedings will bar a subsequent suit [4] And although the mere order of a Court without contest is not necessarily *res judicata*, still the construction of a document long held should not be lightly set aside [5] Although a decree does not in terms give a certain relief, yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court upon a subsequent application to treat those orders as erroneous and put another construction on the decree [6]

Compromise —The effect of a compromise is to extinguish the decree, which can only be enforced by a fresh suit and not by an application for execution of the former decree [7]

Appeal —An order refusing execution is a decree, and an appeal will lie to determine if the Court has exercised a proper discretion [8]

High Court —Sub section (*b*) now expressly saves the provision of art 180 Sch II, Act XV of 1877 and apparently does not apply to decrees made by the High Court,[9] or to orders in Council [10] or to an order made under s 86, of 11 and 12 Vict cap 21 But when the High Court passes a decree on appeal, the Court which has to execute the decree of the High Court is governed by the rules which govern the execution of its own decrees [11]

An order for execution under the Code of Civil Procedure made after notice has, on the Original Side of the High Court, the same effect of reviving a judgment as *scire facias* had [12]

TRANSFEREES AND LEGAL REPRESENTATIVES

Transferee

49 Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment debtor might have enforced against the original decree holder

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[1] Hurrosoondary v Jagobundhoo (1881) 6 Calc 203 and see Gourmoni v Jugut (1890) 17 Calc 57 p 63

[2] Nanchand v Vithu (1895) 19 Bom 258

[3] Kuppu Ammal v Saminatha (1895) 18 Mad 482

[4] Kali Mundul v Kedar Nath (1880) 6 C L R 215 Mungal Pershad Dichit v Grija Kant (1880 1) L R 8 I A 123 8 Calc 51 But see Ishwardas v Dosibai (1883) 7 Bom 316

[5] Gopal Hanmant v Kondo (1885) 9 Bom 379

[6] Venkata Narasimha v Papamal (1896) 19 Mad 54 See note to s 11

[7] Hari v Krishnaji Anant (1895) 19 Bom 546

[8] Chena v Ghelabhai (1883) 7 Bom 301 And see sec 2 vide decree

[9] Mayabhai v Tribhuvan Dass (1882) 6 Bom 258 Ganapathi v Balasundara (1884) 7 Mad 541

[10] Futteh Narain v Chundrabati (1893) 20 Calc 551

[11] Kistokinker v Burrodakant (1872) 10 B L R 101 14 Moo I A 465

[12] Aushootosh Dutt v Doorga (1871) 8 C L R 23 6 Calc 504 Futteh Monohur Dass bendro (1890) 17 W N 793, 30 Calc 979

Act XIV of 1882 sec 233

This section applies to H C and Prov S C C

The transferee in execution holds subjects to the equities which may be enforced against the original decree holder, and will hold subject to the rights of the judgment debtor to set off a cross decree in existence at the date of his purchase and in the same Court [1] And where the assignment is fraudulent, the right of set off remains unaffected [2]

Attached debt — A assigned to B his right in a decree obtained by him against a certain person who afterwards had the decree set aside and the suit re heard when a decree was again given in favour of A Thereupon D attached it for a debt due to him by A *held* that D's claim was prior to B's [3]

Assignee with notice —*An equity against a decree holder operates against his assignee with notice* [4]

The assignee of a simple money decree may bring to sale in execution thereof property previously mortgaged by the judgment debtor to the assignor and section 99 of the Transfer of Property Act is no bar [5]

50 (1) Where a judgment debtor dies before the decree has been fully satisfied the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased

Legal representative

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of, and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree holder, compel such legal representative to produce such accounts as it thinks fit

Act XIV of 1882 sect 234 This sect applies to H C and Prov S C C [6]

The Court which passed it Under Act XIV of 1882, sect 234 it was held that an application to execute a decree against the legal representative of a j[...]ent debtor might also be made to the Court to which a decree is transferred fo[...] [7]

[...]**nder this section** —When the legal representative is put on th[...]e party to the suit, within the meaning of section 47 [8]

[1] Ka[...] W R (F B), 32 I B L R (F B) 23, Do[...] R 442 Opendro Mohun v Poorno Chun[...] Chunder v Mohendro Nath, (1874) 21 W P

[2] Talub H[...] R 470,

[3] Girish C[...] (1880) 6 C L P 498

[4] Kristo P[...] 16 Calc 619 See also Sinnu Pandaram v Santhoji L[...] 28

[5] Bank Lal v Man[...] All 450

[6] See Ajmere Reg II [...] 20

[7] Sham Lal Lal v Modhu[...] Sircar (1895) 22 Calc 558 But see Hirachand v Kasturchand (1894) 18 [...]m 224

[8] Kuriyali v Mayin (1884) 7 Mad 255 Chuni Lal Bose v Beeby, (1903) 30 Calc 1044

In Bengal [illegible]

made representatives,[3] or the decree has been obtained against the heirs[4]

The same rule applies where a decree has been given against a *karnman*, and his representatives are put on the execution record[5]

Property in possession of a third party —A person cannot be put on the record on the mere ground that he is in possession of property, so long as there is a legal representative on the record But the judgment creditor can [illegible]

purchaser from an heir or devisee knows that there are debts unsatisfied, and the heir or devisee to whom he has paid the purchase money does not intend to apply it to the payment of debts,[8] or there are not assets to pay the debts,[9] the property [illegible]
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in collu
tained the price, he was held liable[10]

Property disposed of by heirs —As regards Muhammadans and Hindus, if the heir has disposed of the property which he has inherited to a *bona fide* purchaser, the creditor cannot follow the property into the hands of the purchaser, but the heir is liable to account for the assets he has received[11] and similarly the executor of a Muhammadan can, subject to the limitation imposed by the Succession Act in case of real property, sell the estate of the deceased to pay his debt[12]

If judgment-debtor dies —See note "DECREE AGAINST PARTY DECEASED DURING SUIT," O XX, r 6

In Allahabad it has been held that this section does not render void a sale of property attached, which takes place after the death of the original debtor and before his representative is placed on the record,[13] but *contra* in Madras[14] that when on the death of a judgment debtor his property is sold without bringing his legal representative on the record, the sale is bad It does not apply to the case of a creditor seeking to sell property attached during the lifetime of the judgment

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1 Punchanun v Rabia (1890) 17 Calc 711 Roop Lall v Bekani (1888) 15 Calc 437

2 Rajrup v Ramgolam (1889) 16 Calc 1

3 Mungeshur Kuar v Jamoona (1889) 16 Calc 603 Raghubur Dial v Hamid, (1890) 12 All 74

4 Mulmantri v Ashfak (1887) 9 All 605

5 [illegible] v Kunji (1887) 10 Mad 117 and as to the reversioners of a Hindu widow see Chintamoni v Maheschandra (1896) 23 Calc 454

6 Nadir Hossein v Bissen Chand (1878 9) 3 C L R 437 see also Oriental Bank v Gobinlall (1884) 10 Calc 713

7 Mahomed Agha v Widow of Balmakund (1875 6) L R 3 I A 241 p 245

8 Greender Chunder v Mackintosh (1879) 4 Calc 897

9 Narsingh Dass v Najmoodin (1882) 8 Calc 20

10 Gooroo Dass v Ram Narain (1883 4) L R 11 I A 59

11 Bazayet Hossein v Doolichand (1879) 4 Calc 402 L R 5 I A 211 see also Yasin Khan v Muhammad Yar Khan (1897) 19 All 504

12 Kaleo Narain v Ram Coomar W R (1864) 1 99 Wahidunnissa v Shubrattun (1870 1) 6 B L R 54 and see Greender Chunder v Mackintosh, (1879) 4 Calc 329

13 Stowell v Ajudhia (1884) 6 All 255

14 Krishnayya v Unnissa (1892) 15 Mad 399 and Groves v. Administrator General (1899) 22 Mad., 119 at page 125

debtor[1] or to a decree holder striving to recover possession if the order for possession has been passed during the lifetime of the defendant[2] An injunction obtained against a defendant restraining the latter from obstructing the access of light and air to certain windows may on the death of the defendant be enforced against his son as his legal representative[3] If the legal representative of a deceased judgment debtor dies before execution can be taken out against him, the decree can be executed against his legal representative to the extent of any assets of the original judgment debtor that may have come into his possession[4]

Legal Representative —This term has now been defined by sect 2 (11) and which clears up the doubts which arose in the construction of the words in the corresponding section of the former Code

Burden of proof —When in execution of a decree against the representative of a deceased judgment debtor specific property has been seized as the property of the deceased debtor and as being in the possession of his representatives, and the judgment debtors claim the property as their own the burden of proof is on the decree holder[5]

Hindu widow —In a decree in which a Hindu widow is defendant in her representative capacity the heirs of her husband are her legal representatives[6]—see sect 2 (11) and the same rule applies if she sues for possession of family property and is cast in costs[7] but the heir of the last full owner is not in regard to a mere personal money decree against the widow her representative[8]

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member[13] and consequently the obligation to pay even a father's debt does not arise from the decree or procedure but from Hindu law[14] The interest of the father in a Mitakshara family in the joint ancestral property is not assets in the hands of the son when he dies and consequently proceedings cannot be taken against the son as the legal representative of his father If after the death of the father the creditor wishes to proceed against the son he must do so by a

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1 Sheo Prasad v Hira Lal (1890) 12 All 440

2 Basyakka v Fakira (1889) 12 Mad 211

3 Sakarlal v Parvatibai (1902) 26 Bom 283

4 Jafri v Suri (1900) 22 All 367

5 Abdul Rahman v Muhammad Azim (1899) 4 Calc W N 151

6 Pramoda [illegible] v Kally Kanto (1902) 6 Calc 479 Hari Saran v Bhubaneswari (1889) 16 Calc 40

7 Ram kishore v Kally Kanto (1881) 6 Calc 479

8 Kameshwar v Run Bahadur (1886) 12 Calc 458 And see Hari Saran v Bhubaneswari (1889) 16 Calc 40

9 Chullarree Lall v Kanto (1874) 22 W R 56 14 B L R [illegible] I L A 391

10 K [illegible] wing Zen [illegible] v S (1890) 13 M [illegible] v Venka [illegible] 16 All,

[illegible] Madho Prasad v Mehrban (1891) 18 Calc 157 p 163 (1889 90) [illegible] 191

[illegible] v Dorasami (1888) 11 Mad, 413 [illegible]

separate suit[1] But if the decree has been followed by attachment and order of sale, or the property is directed to be sold as hypothecated, execution may issue[2] and a separate suit will not lie[3] And where a decree for maintenance was passed against the father, and it did not appear he was sued as manager, it was held that the decree could be executed against the assets of the deceased in the possession of the sons, but these would not include the interest the father had in the joint estate[4]

The widow in a joint family obtained a decree for maintenance against her husband's brother, which was not expressed to be a decree against the head or representative of the family *held*, in execution against the representative of the judgment debtor that the family estate was not liable[5] But it has now been held by the Bombay High Court that a money decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands, even if the ... is not ... ecree is ... bts are

Legal representative not required —Execution proceedings do not abate like suits[7] but execution cannot issue against the estate of a deceased person, until there is some one on the record as representing the estate[8] And if subsequent to attachment of immoveable property the judgment debtor dies, the property may be sold, without making the legal representative a party[9] The Civil Procedure Code does not contemplate the representatives of a judgment debtor being placed on the record after the appellate decree has been passed[10]

Practice —When an application is made under this section, the Court must, in the first place, issue notice on the person named, calling on him to show cause why the decree should not be executed against him as legal representative, but if the Court has, on a previous application, issued execution against him, no notice is necessary—Order XXI, r 21,[11] If the Court considers that he is the legal representative, it may apparently enter his name on the record without trying the question whether or not he has assets[12] It is for the Court which passed the decree to decide whether the person against whom execution is sought, is or

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[1] Juga Lal Chaudhuri v Audh Behari (1901 2) 6 Calc W N 223 Kal Krishna v Raghu Nath D b (1904) 31 Calc 224 But see Ram Das v Braja Behari (1901 2) 6 Calc W N, 879, which was dissented from in the last mentioned case

[2] Sivagiri Zamindar v Tiruvengada (1884) 7 Mad. 339

[3] Kurivali v Majan (1884) 7 Mad 25?

[4] Karpakambal v Ganapathi (1882) 5 Mad 234

[5] Muttia v Virammal (1887) 10 Mad 283

[6] Umed Hathising v Goman Bhaiji (1896) 20 Bom 385 See also Jagabhai v Bhukandas (1887) 11 Bom 37 Atrabudra v Dorasami (1888) 11 Mad, 413 and Lachmi Narain v Kunjilal (1894) 16 All 449 which two latter cases were dissented from in Umed Hathising v Goman Bhaiji

[7] Gulabdas v Lakshman Narhar (1879) 3 Bom. 221

[8] Lekraj v Becharam (1867) 7 W R 52

[9] Sheo Prasad v Hira Lal (1890) 12 All 440 not following Ramasami v Bagirathi (1883) 6 Mad 180

[10] Hirachand v Kasturchand (1894) 18 Bom 224

[11] Mahatab Chund v Pearce Dossee (1866) 6 W R Mis 61 Poorihit Lall v Saheeran (1867) 7 W R, 368

[12] H ... 6 B L R. App 100 (1870) 2 Mad. H C 423, Wahed ... R. 185 and compare Lallu ... iromdhur v Agra Bank (1880)

is not the representative of a deceased judgment debtor, but it is for the Court executing the decree to decide to what extent such person is liable [1]

Come into his hands —It would then be for the decree holder, in the first place to make search for the property of the deceased, and if no such property could be found then to prove that some of the property of the deceased had come into the possession of the representative, and if this were proved, it would lie on the latter to show that he had properly disposed of the property, and upon his failing to prove that he would be personally liable to the extent of it even though he pleaded that the debtor was merely a *benami* holder [3] F his liability extends no further [4] So, where a representative made payme in satisfaction to the full value of the property of the deceased which had c into his hands it was held that he was no longer liable, although the dec holder might be able to prove that he had property in his possession w originally belonged to the deceased [5] In accounting mesne profits, wh they have accrued in the shape of rents collected or interest on moneys t may have come to him from the estate of the deceased must be brought in account Where no such account was given the Court held that the c could be executed to the extent of the assets which it found had come i hands and had not been accounted for [6] The *tarwad* property in the ha the successor of the *Karnavan* of a Malabar *tarwad* are not assets of the de in the hands of his successor and the share of a deceased father in an un Hindu family passes by survivorship to the sons and is not assets in thei to satisfy a decree against their father [7]

Limitation —An application for execution against one of the representa tives of a sole judgment debtor saves limitation against another representative [8]

Appeal —An appeal lies from an order determining who is a legal represent ative in execution [9] or the order may be set aside by a regular suit [10] or if this is barred by an injunction restraining execution [11]

Costs —Where a defendant succeeded in showing he was not the legal repre sentative but was refused his costs it was held under the former Code that he could appeal under s 244 (section 47) [12]

Claims to property —Where a person states that the property attached in execution of a decree is held by him as his own estate and not as the legal representative of the deceased judgment debtor the matter should be determined in the course of the execution proceedings and the parties should not be referred to a regular suit [13] Where the judge refused to hear the objections of a person who though reversioner denied that he was the representative of the judgment debtor a Hindu widow and placed him on the record *held* he was not barred

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[1] Seth Shapurji v Shankar Dat (1895) 17 All 431

[2] Isodro Narain R v Nittyanund (1867) 8 W R 19; W d I Al J mace (1872 3) 11 I L R 149

[3] Durga Soondree v Soorjo Monee (1867) 8 W R 101

[4] Khushr Har v H rmazsha (1887) 11 Bom 727

[5] Ram Golam D bey v Ayma (1869) 12 W R 177

[6] Aseemoonnissa v Ameeroonnissa (1871) 15 W R 285

[7] Pavi Varma v Kooman (1882) 5 Mad 223 See note under order XXII, r 4 and see JOINT FAMILY

[8] Ram Anuj v Hingu Lal (1878 81) 3 All 517 Krishnaji v Murrirav, (1888) 12 Bom 48

[9] S e Sec 47 *ante*

[10] Al lumissa v Amirunnissa (1877) L R 4 I A 66 2 Calc, 327

[11] Dl urmdl ur v Agra Bank (1880 5 Calc 86

[12] B l n Dayal v Bank of Upper India (1891) 13 All 290

[13] Seth Chand v Durga D (1889) 1 [illegible] (1889) 16 Calc [illegible] 8 Mungel

[14] [illegible] Panchanun v Lal [illegible] (1890) 17 Calc [illegible] (1887) 9 Bom 478 See Syed [illegible] Rahimatu v Jegeshur (1906) A W N

subsequently from showing in a regular suit, that the decree only covered the widow's interest [1]

Official Assignee—An order vesting the estate of a judgment debtor in the Official Assignee does not give him a greater interest in it than the insolvent had. An order for the sale of certain property belonging to the insolvent, which was under attachment in execution of a decree when the vesting order was passed, is legal notwithstanding that order, and the sale is valid [2]

Answer—As to the form of answer which a legal representative can advance, see order XXII, r 7 [3]

PROCEDURE IN EXECUTION

Powers of Court to enforce execution

51 Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

(*a*) by the delivery of any property specifically decreed,

(*b*) by attachment and sale or by sale without attachment of any property,

(*c*) by arrest and detention in prison,

(*d*) by appointing a receiver, or,

(*e*) in such other manner as the nature of the relief granted may require

As may be prescribed—That is by the Rules in Part II of this Code

This section merely sets out generally the powers of the Court in regard to execution and the details are left to be determined by rules made under this section See Order XXI post

Immediate Execution—The power to direct immediate execution is now general in terms and applicable to all classes of suits any restrictions upon it must be sought for in the Rules

Enforcement of decree against legal representative

52 (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property

[1] Kanai Lall v Shasi Bhusan (1881) 6 Calc 777 and see Rajrup Singh v Ramgolam (1889) 16 Calc 1 p 8 See note under section 47

[2] Anand Chandra Pal v Panchilal Sarma (1870) 5 B L R 691 and see Laycock v Madan Gopal (1901 2) 6 Calc W N 577 As to an attachment before judgment see Shib Kristo v Miller (1884) 10 Calc 151 Subbayya v Ponnama (1885) 8 Mad 504

[3] Gourmoni v Jugut (1890) 17 Calc 57 Mulchand v Chhagan (1886) 10 Bom 74

(2) Where no such property remains in the possession of the judgment debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment debtor to the extent of the property in respect of which he has failed so to satisfy the Court, in the same manner as if the decree had been against him personally

Act XIV of 1883, sect 252 This section applies to H C and Prov S C C. See Reg II of 1877, s 29

This section primarily refers to a party who has been substituted before decree for the original debtor, but it is equally applicable to a person who has been made a party in the execution
and a decree obtained against a m
no execution was allowed to issue
will not give a decree against parties as representatives of a deceased debtor where the suit is brought not on the ground that the defendants are legal representatives but on the ground that they have property of the deceased in their possession [3]

Legal representatives —This includes the heir of an intestate [4]

It is necessary that the party against whom the decree is passed should be the legal representative who has succeeded to the property of the deceased debtor,[5] unless the legal representative has put forward another as representative and is precluded from disputing the decree [6] Thus, where a decree was given against one of two separate Hindu brothers as representative of the other who had died leaving a widow, it was held that execution could not be had against the property of the deceased in the hands of the widow, on the ground that the widow, and not the brother was the legal representative [7] And where a decree was given against the widow of a deceased member of a joint Mitakshara family as his representative it was held that execution could not be had under it against the property of the deceased which had passed to the other members of the family by survivorship [8] On the death of a Hindu insolvent, his widow may be his legal representative within the meaning of this section, the existence of an order vesting his estate in the Official Assignee in no way affecting her possession as such representative [9]

Liability —The decree must in the first instance be executed or attempted to be executed against the property of the deceased "in the hands of the re

[1] see s. 141; and Jafur Hossein v Hingun Jan (1867) 8 W R 161

[2] Girendronath Tagore, petitioner (1874) 14 B L R 334 note.

[3] Heera Lall v Digumburee Kulsomee (1870) 14 W R 431, 6 B L R, App 100

[4] Greender Chunder Ghose v Mackintosh (1879) 4 C L R, 210 See Section 2 (11) ante

[5] Baswantapa v Ranu (1885) 9 Bom 86, Sukh v Rennick, (1882) 4 All, 192.

[6] Baswantapa v Ranu (1885) 9 Bom 86, Subbana v Venkatakrishnan (1888) 11 Mad, 408

[7] Natha Hari v Jamni (1871) 8 Bom., H C, A C J, 37

[8] ...dabart Prasad v Foollash Koer, (1869) 3 B L R, (F B), 31; see also ... Baswantapa v Ranu (1885) 9 Bom, 86.

[9] ... Umall v Sonad ... Dasee (1895) 22 Calc, 259 Several representatives — ... As to the difference between Hindu and Muhammadan law —Juta Hari Lal ... Chowdhry (1883) 9 Calc 708 ... n h

presentative."[1] The private property of the representative cannot be attached and sold until it is shewn in the execution proceedings that he has received assets of the deceased, of which he fails to prove a proper disposition,[2] and which should be proved by filing an inventory of the whole estate descended to him, and shewing how it has been applied[3] If he is proved to have received, or if he has admitted the receipt of, assets, which he may do by implication *e g* by asking time to pay the amount of the decree,[4] and fails to account for their value, execution may be had by attachment and sale, or by imprisonment, as in the case of any ordinary debtor,[5] whether the debt for which the decree was passed became due before or after the death of the debtor,[6] and his liability is limited to the amount of assets of the deceased which may have come to his hands and has not been duly disposed of[7]

He is bound only to pay the full value of the assets which he received in that capacity, and if he has properly done so, even though he may still hold property which originally belonged to the deceased judgment debtor, the decree can no [illegible]

[illegible]

capacity as representative[8] Where a party is sued for money as the heir and possessor of the assets of a deceasd debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree therefor may be passed against him[9]

Personal—Certain decrees against a deceased judgment debtor are, however, only personal decrees For instance a decree to give accounts within a certain time, with an alternative in the shape of the payment of a sum of money in the event of refusal or neglect to do so, is a personal decree and when the judgment debtor has survived the period during which the account was to be given, and no proceedings are taken against him either then or subsequently the decree cannot be executed against his representative[10]

Purchases from—The legal representative of a deceased judgment debtor is responsible, not for the property which came into his hands in such capacity, but for its value He can sell any such property to a third party, and a creditor cannot follow it into the hands of one who has purchased it in good faith and for valuable consideration The decree holder can only make the legal representative personally liable for the debt to the extent of the assets he received,[11] but if the purchaser is affected by a *lis pendens* or a creditor s notice, the purchase is subject to the demand[12]

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1 Shurfun v Collector of Sarun (1868) 10 W R 190

2 Wahed Ali v Jumaee (1872) 18 W R 185 Indro Narain v Kristo Chunder (1870) 14 W R 362 Ameeroonissa v Meer Mahomed (1873) 20 W R 280 Mooktakeshee Debia v Wooma Churn (1869) 12 W R 233

3 Joogul Kishore v Kalee Churn (1876) 25 W R 224

4 Ghotta Shayee v Gour Monee (1874) 21 W R 117

5 Wahed Ali v Jumaee (1872) 18 W R 185 Mahatab Chunder v Munmohinee Dossee (1869) 12 W R 517

6 Mooktakeshee Debia v Wooma Churn (1869) 12 W R 233
Singili Virapandia v Alwar (1878 81) 3 Mad 42

8 Ram Golam v Ajma Begum (1869) 12 W R 177 See also Jafur Hossein v Hingun (1867) 8 W R 161

9 Nathuram Sivaji v Kutti Haji (1897) 20 Mad 446

10 Bidhoo Mookhee Dossee v Bejoy Keshub (1869) 12 W R 495

11 Unno Poorna v Gunga Narain (1865) 2 W R 296 Land Mortgage Bank v Bidyadhari (1880) 7 C L R 460 Land Mortgage Bank v Rai Luchmiput, (1881) 8 C L R 447

12 Bizayet Hossein v Dooli Chund (1879) 4 Cal, 402 L R, 5 I A 211 Narsingh Dass v Najmoodin (1882) 8 Calc 20 Ram Dhun v Mohesh Chunder (1883) 9 Calc 406

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment debtor to the extent of the property in respect of which he has failed so to satisfy the Court, in the same manner as if the decree had been against him personally

Act XIV of 1882, sect 252 This section applies to H C and Prov S C C See Reg II of 1877, s 20

This section primarily refers to a party who has been substituted before decree for the original debtor, but it is equally applicable to a person who has been made a party in the execution proceedings,[1] but where a suit was brought and a decree obtained against a man who had died before the filing of the plaint no execution was allowed to issue against his legal representatives[2] The Court will not give a decree against parties as representatives of a deceased debtor where the suit is brought not on the ground that the defendants are legal representatives but on the ground that they have property of the deceased in their possession[3]

Legal representatives —This includes the heir of an intestate[4]

It is necessary that the party against whom the decree is passed should be the legal representative who has succeeded to the property of the deceased debtor[5] unless the legal representative has put forward another as representative and is precluded from disputing the decree[6] Thus, where a decree was given against one of two separate Hindu brothers as representative of the other who had died leaving a widow, it was held that execution could not be had against the property of the deceased in the hands of the widow, on the ground that the widow, and not the brother, was the legal representative[7] And where a decree was given against the widow of a deceased member of a joint Mitakshara family as his representative it was held that execution could not be had under it against the property of the deceased which had passed to the other members of the family by survivorship[8] On the death of a Hindu insolvent, his widow may be his legal representative within the meaning of this section, the existence of an order vesting his estate in the Official Assignee in no way affecting her possession a[illegible]uch representative[9]

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[1] See a[illegible] Hossein v Hingun Jan (1867) 8 W R 161

[2] Giren[illegible]titioner (1874) 14 B L R 334 note.

[3] H[illegible]e Kuloonee (1870) 14 W R 431 6 B L R, Ap

[4] Green[illegible]Mackintosh (1879) 4 C L R, 210 See Section 2 (11)

[5] Biswa[illegible]80; Sukh v Pennick, (1882) 4 All, 192.

[6] Biswa[illegible]60 Sullana v Venkatakrishnan, (1888) 11 M

[7] Natha[illegible], A C J, 37

[8] [illegible](1869) 3 B L R, (F B) 31, see also [illegible], 86

[9] [illegible](1895) 22 Calc, 250 Several representatives —[illegible]een Hindu and Muhammadan law —Jutadhari Lal [illegible]alc, 508

presentative."[1] The private property of the representative cannot be attached and sold until it is shewn in the execution proceedings that he has received *assets of the deceased, of which he fails to prove a proper* disposition;[2] and which should be proved by filing an inventory of the whole estate descended to him, and shewing how it has been applied.[3] If he is proved to have received, or if he has admitted the receipt of, assets, which he may do by implication *e g* by asking time to pay the amount of the decree,[4] and fails to account for their value, execution may be had by attachment and sale, or by imprisonment, as in the case of any ordinary debtor,[5] whether the debt for which the decree was passed became due before or after the death of the debtor,[6] and his liability is limited to the amount of assets of the deceased which may have come to his hands and has not been duly disposed of.[7]

He is bound only to pay the full value of the assets which he received in that [illegible] hold property [illegible] decree can no [illegible] representative [illegible] and reason [illegible] were made by him in that capacity in which alone he was liable to make them—*i e*, in his capacity as representative.[8] Where a party is sued for money as the heir and possessor of the assets of a deceased debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree therefor may be passed against him.[9]

Personal.—Certain decrees against a deceased judgment debtor are, however, only personal decrees. For instance a decree to give accounts within a certain time, with an alternative in the shape of the payment of a sum of money in the event of refusal or neglect to do so, is a personal decree; and when the judgment debtor has survived the period during which the account was to be given, and no proceedings are taken against him either then or subsequently, the decree cannot be executed against his representative.[10]

Purchases from. The legal representative of a deceased judgment debtor is responsible, not for the property which came into his hands in such capacity, but for its value. He can sell any such property to a third party, and a creditor cannot follow it into the hands of one who has purchased it in good faith and for valuable consideration. The decree holder can only make the legal representative personally liable for the debt to the extent of the assets he received;[11] but if the purchaser is affected by a *lis pendens* or a creditor's notice, the purchase is subject to the demand.[12]

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[1] Sharfun v. Collector of [illegible] (1868) 10 W. R. 190.

[2] Wahed Ali v. Jumaee (1872) 18 W. R. 185; [illegible] Kristo Chunder, (1870) 14 W. R. 282; [illegible] (1873) 20 W. R., 250; [illegible] (1869) 12 W. R. 233.

[3] [illegible] (1876) 25 W. R. 221.

[4] [illegible] (1874) 21 W. R. 137.

[5] Wahed Ali v. Jumaee (1872) 18 W. R. 185; Mahatab Chunder v. Munmohinee Dassee (1869) 12 W. R. 217.

[6] [illegible] (1869) 12 W. R. 233.

[7] [illegible] (1878) 3 Mad. 42.

[8] [illegible] (1869) 12 W. R. 177. See also Jafur Hossein v. [illegible] 8 W. R. 161.

[9] [illegible] (1897) 20 Mad. 446.

[10] [illegible] (1869) 12 W. R., 495.

[11] [illegible] (1865) 2 W. R., 293; Land Mortgage Bank v. [illegible] 491; Land Mortgage Bank v. Rai Luchmiput, [illegible] 41.

[12] [illegible] (1879) 4 Calc., 402; L. R., 5 I. A. 211; [illegible] (1882) 8 Calc. 20; Ramdhun v. Mohesh Chun [illegible]

Right to raise questions as to the validity of the decree—Where the sons of a deceased judgment debtor whose estate is declared by the decree to be liable to sale are admitted on the record as his representatives they are not entitled, in the execution stage to re open the whole case and to enquire into the nature of the debt [1]

Judgment-creditors—S 282 of the Indian Succession Act does not, in cases to which that Act applies prevent a person who has obtained a decree under this section from having the whole of his decree satisfied out of the assets of the deceased as far as they go to the exclusion of other parties who have claims admitted to be correct, but who have not obtained decrees [2]

Where no such property remains in the possession of the judgment debtors—These words confine the section to property remaining in the possession of the legal representative and the creditor must follow property improperly alienated in a regular suit [3]

Assets service tenure—Ghatwali lands are not liable to be seized in execution of a decree against the father as property by descent in the hands of his son [4]

Husband's and father's debt—There are, however some cases in which a decree passed against a representative for a debt due by the deceased may be executed against property which has passed to some one other than the representative who is sued but is in the latter's possession Thus where a Hindu died, indebted on a bond leaving a widow and minor son and a decree was obtained on the bond against the widow plaintiff having alleged that she was guardian of the minor son as was the case it was held that a sale in execution of this decree, of the right title and interest of the debtor carried the interest of the deceased, and not that of the widow which was nothing But where the decree is a personal decree the purchaser cannot go behind it and the sale proceedings, to show that the sale was not confined to her limited interest [6] and where the decree did not describe the
it and the widow
Roy deceased ar
was held that the
widow as their he
guardian of her minor son for a debt due by her husband and a decree obtained against her as representative in possession and ostensible owner of her husband's property it was held that a sale under that decree nominally of the widow's interest carried the interest of the deceased the sale certificate referring to the decree [8] but where a Hindu defendant died leaving a widow and a minor son, and the suit was continued against the widow not as guardian of her son, and

[1] Sheo Sah v Ram Bhunjun (187) 23 W R 127 Butt v Ram Dumessur (187) 24 W R 364

[2] Nil Kamul Shaw v Peel (1872) 17 W R 513

[3] Greender Chunder v Mackintosh (1879) 4 C L R 210

[4] [illegible]

[5] Khan Chunder v Bukeh Ali (1864) Marsh 614 explained in Lujun Dooley v Brij Bhookun (1870) 1 Cal 133, L R 2 I A 275 Satish Chunder v Nil Comal (1880) 11 Cal 45 Hari Saran v Bhuban swari (1889) 16 Calc 40 Jugal Kishore v Jotindro Mohun (1883 4) L R 11 I A 66

[6] Pudda Mohan v Soolu Khanam (1878 9) 3 C L R 530

[7] Makoon Dobe v Bunmali Bhai (1878 9) 3 C L R 473

[8] Court of Wards v Ramajut Singh (1871 2) 14 Moo I A 605 10 B L R, 294 17 W R 429 see also Norendra Nath Lahari v Bhupendra Narain Roy (1895) 23 Calc 391

after the widow's death against the sister of the defendant, who was not appointed guardian *ad lit m* to the minor, or administrator of his estate, it was held that the minor was not bound by the decree [1]

Where in Bengal the ... the test to be appl ed ... determ ... [illegible]

cree and the record of the sale proceed ngs [3]

[illegible]

under that decree carried only the share of the daughter against whom the decree was passed [5] And where a decree was obtained against a Mahomedan widow for a debt due by her husband who had died leaving a widow and a minor daughter, it was held (though the point was not directly before the court) that the daughter was not bound by the decree [6] So also where a decree by consent was obtained against some of the heirs of a Mahomedan for a debt due by h m, the decree only bound those who were parties to it [7]

Appeal—Under s 253 Act XIV of 1882, an appeal lay from orders passed against a representative (the section corresponding to the present one) and it would seem to lie under the present Code See sections 2 (2 and 96

53 For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in

Liability of ancestral property

[1] Jatha Naik v Venktapa (1881) 5 Bom 14

[2] [illegible]

Gonesh Chunder (1884) 10 Calc 823

[3] Radha Mohun v Soshi Bhusun (1878 9) 3 C L R 530 The cases are not uniform Thus some of the ... [illegible] ... that of Iean Chandra Mitter Marsh 614 but whether they ... very doubtful they are certain ... opposed to the ... previously ... Ramasami Chetti v Saluka (1884 5) 8 Mad H C 186 where it was held that proceedings [illegible]

[4] Sitanath Das v P ... (1882) 11 C L R 268

[5] Hendry v Mutty Lall Dhur (1877) 2 Cal 395 ... Lal ... Land Mortgage C (1887) 14 Cal 461

[6] Hamir Singh v Zakia (1876 8) 1 All 57 ... v ... Muhammad (1885) 7 All 822 ... Khadija v ... (1888) 12 Bom 101 See also on this point Sham ... (1870) 11 W R 448 Raj Kristo Singh v Burgshe ... (1870) 14 W R 448 *not*

As ... Singh (1879) 4 Calc 143 explained in Jutadhari ... (1883) 9 Cal 908 Abdulla v Abdulla (1881) 5 Bom 8 ... Mirjan (1881 2) 10 C L R 347, 8 Cal 370 followed ... Ahmad v Baij Nath (1894) 21 Calc 311, ... Khurset v ... (1888) 12 Bom (1885) 7 All 822 followed in All 716, see also Dillu Mal v

respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative

The effect of this new section is to enable decree holders to have such questions of Hindu Law tried out in execution and to spare them the expense and delay entailed by the institution and maintenance of a fresh suit. It is of course open to the son or other descendant to set up all or any defence which he could raise in a separate suit and no liability is imposed by this section other than that established by the substantive Hindu Law. The section sets at rest a conflict of judicial opinion see section 50 [illegible][1]

Partition of estate or separation of share

54 (1) Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall, be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition or the separate possession of shares, of such estates

Act XIV of 188[illegible] sect 265 This section applies to H C

Estate This word must be read in its ordinary signification[2] it does not include a *ryotwari* holding in Madras (see explanation) nor a share of a certain defined portion of a *mahal*[3]

Collector Decrees for the partition of revenue paying estates must be carried out by the Collector[4] even to putting the parties in possession of their respective shares[5] the execution cannot be interfered with by the Civil Court[6] But where the plaintiff does not seek to disturb his joint liability for the revenue and no separate allotment of revenue is asked for, this section does not apply[7] Lands leased by Government for a number of years or *sheri* lands are not excluded from the general Hindu law of partition[8] Where a decree for partition of an estate has been transmitted by the district Court to the Collector for execution under this section the Court that made the decree is not deprived of its judicial power to hear and decide objections to the division of the estate made by the Collector[9] Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in

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[1] [illegible] (189[illegible]) [illegible] Bom [illegible]; Jugal Lal Chowdhury v. Audh Behary Singh (1900) 6 Calc W N, 223

[2] Secretary of State v. Nundun Lall (1884) 10 Cal, 435

[3] Ram Dyal v. Megu Lal (1884) 6 All. 452 and see Narayan v. Vithu (1884) 8 Bom. 539 in which case it was held that a decree for partition of family property or for separate possession of a share is not one contemplated by the corresponding section of the former Code

[4] Ramjoy Ghose v. Ram Runjun (1881) 8 C. L. R. 367

[5] Fakirbhai v. Shankarbhai (1887) 11 Bom. 662

[6] Dattatraya v. Mahadaji (1892) 16 Bom. 528 Purushottam v. Bal Krishna (1904) 28 Bom. 238 But see Ganpat v. Dhondi (1889) 14 Bom. 450

[7] Collector of Tirhut v. Har Narain (1881) 7 Calc 153; Jogodishury Debea v. Kailash Chandra Lahiry (1897) 24 Calc. 725 (F. B.) 1 Calc W N 374

[8] Dattatraya Vithal v. Mahadaji Parashram (1892) 16 Bom., 528

[9] Chinnaseenayya v. Krishnavaramma (1896) 19 Mad., 43[illegible]

accordance with it, and the decree has become, by lapse of time or otherwise unenforceable, it is competent to the parties or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for partition [1] In a decree for partition, the right of each individual is determined, and an application by one party to execute may be continued by another [2]

In the North West, a suit for partition and possession of the share in an isolated plot in a joint zemindari by a co sharer cannot be brought in the Civil Court [3] A suit for partition between parties one of whom owns interests subordinate to the other is maintainable [4] A decree for partition does not operate as a severance so long as it remains under appeal [5]

ARREST AND DETENTION

55 (*1*) A judgment debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained

Arrest and detention

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling house shall be entered after sunset or before sunrise

Provided, secondly, that no outer door of a dwelling house shall be broken open unless such dwelling house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment debtor is to be found

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Nasratullah v Mujibullah (1891) 13 All 309 and similarly where a suit for partition has been dismissed for default Bisheshur Das v Ram Prasad (1906) 28 All 627 (1906) A W N 142 and Maidin v Baikunta (1906) 10 A W N 838

[2] [illegible] wever Mohun Chunder [illegible] mat Ali v Walunissa [illegible] out a partition case [illegible] opal Chunder (1878) 3 Calc 514

[3] Ijrail v Kanhai (1888) 10 All [illegible]

[4] Hemadri v Raman Kant (1897) 24 Calc [illegible] 1 Calc W N 400 (F B); but see Mukunda Lal v Lehuraux (1893) 20 Cal 379 followed in Radha v B pro (1905) 1 Calc L J 40

[5] Sakharam v Harikrishna (1882) 6 Bom, 113

Provided thirdly that if the room is in the actual occupancy of a woman who is not the judgment debtor and who according to the customs of the country does not appear in public the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing may enter the room for the purpose of making the arrest

Provided fourthly that where the decree in execution of which a judgment debtor is arrested is a decree for the payment of money and the judgment debtor pays the amount of the decree and the costs of the arrest to the *officer arresting him such officer shall at once release him*

(2) The Local Government may, by notification in the local official Gazette declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf

(3) Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the Court the Court shall inform him that he may apply to be declared an insolvent and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force

Where a judgment debtor expresses his intention ... be declared an insolvent and furnishes security, ...ction of the Court that he will within one ... and that he will appear when called upon ... upon the application or upon the decree ...ch he was arrested, the Court shall ...est and if he fails so to apply and to ...urt may either direct the security to be ... commit him to the civil prison in execution of the decree

Second Proviso This effects a change in the law and is an endeavour to prevent vexatious resistance to executions the outer door is no longer any protection to the judgment debtor if he endeavours to resist execution

Sub-section (2) This sub-section is intended to cover the case of ... and others whose sudden arrest might endanger or inconvenience the general public

This section applies to H C and Prov S C C For power to refuse an application for imprisonment of a judgment debtor in Ajmere and Merwar, see the Ajmere Courts Regulation, 1877, (I of 1877), s 31 This section applies to Small Cause Court debtors [1]

Personal decree—Where a decree upon a hypothecated bond allows satisfaction of the debt from the hypothecated property and also from the judgment debtor personally and contains no condition that execution shall first be enforced against the property, there is no principle of equity which prevents the decree holder from enforcing his decree against the judgment debtor's person or property, whichever he may think best[2] but when the decree merely provided for the satisfaction of the judgment debt out of the property mortgaged, the decree could not be executed against the person of the judgment debtor [3]

Any other place—For a list of such places in Burmah, see notification No 217, Burmah Gazette, 1897, Pt I, p 256, and in Madras, see Fort St George Gazette, 1903, Pt, I p 646

In execution of a decree—This section and sections 57 and 59 extend to all arrested persons under this Code whether in execution or otherwise see section 134 *post*

Purview of the section—When in a bond under the corresponding section 336 of Act XIV of 1882 besides the usual covenants to produce the judgment debtor before the Court and that the judgment debtor would apply to be declared an insolvent, further stipulations were contained as to what should happen if the judgment debtor's application to be declared insolvent were refused, it was held that the latter stipulations were not such as were contemplated by the section and could not be enforced thereunder [4]

Step in aid of execution—An application by the heirs of a deceased judgment creditor for the arrest of the judgment debtor, is a step in aid of execution, though at the time of application they had not taken out a certificate under Act VII of 1869, nor had they applied for substitution of their names on the record [5]

Shall be discharged—A person arrested and brought up before the Court should be discharged on giving security and stating his intention to file a schedule[6] but if he has been sent to prison, he can only be released under sec 58 [7]

Liability to arrest—Persons exempt from personal appearance in Court under ss 132 133 whether male or female, are subject to s 56 liable to arrest in execution (s 132) [8] An arrest under civil process of a mofussil Court on Sunday is legal [9]

Liability for illegal arrest—As to the liability for negligence of the officer arresting the judgment debtor,[10] or for not taking a proper surety [11] As to when damages may be recovered for arrest in accordance with a decree, see [12]

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1 Moidin v Sundaramurthis (1878 81) 2 Mad , 9

2 Johari Mal v Sant Lal (1887) 9 All 484

3 Budan v Ram Chandra (1887) 11 Bom 537

4 Janki Das v Ram Partab (1894) 16 All 37

5 Hafizuddin Chowdhry v Abdool Aziz (1893) 20 Calc 755

6 Pinsent, ex parte (1885) 8 Mad 276 Hastie in re (1885) 11 Calc 451

7 Quarme in re (1885) 8 Mad 503

8 Maharani of Burdwan v Barada Sundari (1868) 1 B L R (F B) 31, Raj Chunder v Shama Soondari, (1879) 4 Calc , 583

9 (1882) 4 Mad. H C R lxii

10 Kastuchand v Ravji Sadashiv, (1880) 4 Bom 63

11 Nago Mahadeo v Narayan (1880) 4 Bom 465

12 Raj Chunder v Shama Soondari (1879) 4 Calc 583

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest

Provided fourthly, that, where the decree in execution of which a judgment debtor is arrested, is a decree for the payment of money and the judgment debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him

(2) The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf

(3) Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment debtor expresses his intention to apply to be declared an insolvent and furnishes security,
to the satisfacti [illegible] at he will within one
month so apply [illegible] *pear, when called upon,*
in any proceedi [illegible] tion or upon the decree
in execution c [illegible] arrested, the Court shall
ase him fi [illegible] if he fails so to apply and to
ar, the C [illegible] er direct the security to be
ized or com [illegible] e civil prison in execution of
decree [illegible]

Second Prov [illegible] cts a change in the law and is an endeavour to
event vexatious [illegible] executions, the outer door is no longer any
tection to the jud [illegible] tor, if he endeavours to resist execution

Sub-section [illegible] this Sub section is intended to cover the case of
Cı servants a [illegible] others whose sudden arrest might endanger or inconve
he general public

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10 Kastuchand v Rayji Sadashiv (1880) 4 Bom 64

11 Nago Mahadeo v Narayan (1880) 4 Bom 465

12 Raj Chunder v Shama Soondari (1879) 4 Calc, 583

(2) A judgment debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison

Act XIV of 1882, sections 341 and 342 This section applies to H C and Prov S C C It embodies and appears to have the same effect as sections 341 and 342 of the former Code although the language and form are both altered

This provision makes it clear that the ordinary term of detention shall be six weeks or six months as the case may be and that when once the debtor is committed he can only obtain release on one or other of the grounds stated in sub sections 1 to iv

Period—The former Code did not empower a Judge to fix a term of imprisonment at his discretion within the maximum [1] and this section does not appear to have altered the law in that respect

Where a person is imprisoned under Order XXXVIII r 4, imprisonment suffered after decree must be taken into consideration in calculating the six months

On the expiration of the period the prisoner is entitled to his discharge whether the imprisonment has been continuous or only at intervals [3]

Contempt—This section does not apply to cases of imprisonment for contempt of Court [4]

The Code preserves a distinction between arrest and confinement in jail, and immunity from further process is only obtained by actual confinement, [5] or if the discharge takes place after the warrant of commitment has been made out [6] but it is not within the power of a Judge to re arrest a defendant without any petition or motion on behalf of the judgment creditors to that effect [7]

A judgment debtor was arrested in execution of a decree and committed to prison He entered into a compromise with the decree holder for the adjustment of the decree and thereupon the decree holder without certifying the terms of such adjustment to the Court petitioned for the discharge of the debtor who was accordingly released Subsequently the decree holder again applied for execution of his decree He was met by the objection that an adjustment had taken place The matter was not made the subject of inquiry because it was a proceeding taken out of Court The High Court however held that the decree holder was bound to state why he applied to have the debtor discharged, and that if no adequate reasons were shown that he must be taken to have had his decree satisfied The case was accordingly remanded to give the decree holder an opprtunity of stating this [8]

The imprisonment is not a satisfaction of the decree and the debtor can be adjudicated an insolvent for it [9] The property of the debtor remains liable to attachment and sale [10] A judgment debtor once discharged cannot be

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[1] Subaldar Singh (1890) 13 Mad 141 followed in Sujan Lal v Sagar Mandal, (1900) 5 Calc W N, 145

[2] Ghanasham Das v Jibari Mull (1853) 7 Bom 431

[3] Khoda Buksh v Shukrullah (1873) 5 All H C 229

[4] Martin v Lawrence (1879) 4 Cal 655

[5] Chengalraya Chetti v Subbiah (1870 1) 6 Mad H C, 84, Subba v Venkata, (1887) 8 Mad 21

[6] Timapa v Manshvar (188) 9 Bom 181

[7] Shib Ram v Rahmatullah (1871) 15 W R 18

[8] Changa v Kaluram (1867) 4 Bom H C A C

[9] Lal Dharam Chand in the matter of (18) 6 Bom H C 86

[10] Jan Ki Singh v Kalu Mandal (1867 67) B L R, (F B) 559

arrested a second time under the same decree,[1] provided he has been imprisoned under the first arrest [2]

If he is liberated before imprisonment[3] or if after imprisonment he has been released under some other provision of law, e g s 13 Indian Insolvent Act,[4] he may be re arrested

Writ of Habeas Corpus —A Court will release a defendant when the jailor holds no warrant,[5] but not if the warrant is only informal [6]

Instalments —Where a decree is payable in instalments, the debtor cannot be imprisoned for default in the payment of each instalment [7]

Limitation —An application to arrest a debtor in contravention of this section does not give a starting point for limitation under sec 179 (4) Sched II of the Limitation Act [8]

Release on ground of illness

59 (*1*) At any time after a warrant for the arrest of a judgment debtor has been issued the Court may cancel it on the ground of his serious illness

(*2*) Where a judgment debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison

(*3*) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(*a*) by the Local Government, on the ground of the existence of any infectious or contagious disease, or

(*b*) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness

(*4*) A judgment debtor released under this section may be re arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58

Act XIV of 1882 Section 655 (3) and (4)

The existence of —These words are new and are presumably inserted to cover cases in which the judgment debtor has been in contact with some other infected person

[1] Secretary of State v Judah (1886) 12 Calc 652 Bhyrie Chand Dutt in the matter of (1893) 20 Calc 874

[2] Jogendro Narain P v Chunder Mohun Misser (1896) 23 Calc 128

[3] Habibulla v Ram Sahay (1904) 26 All 317

[4] Shamji v Longji (1912) 26 Bom [illegible]

[5] Shah Sahib in the matter of 1 Ind Jur N S 19

[6] Bhoobun Mohun Mullick in re Bourke 90 As to the effect of a pre-existing warrant of the Small Cause Court in Calcutta see Omrito Lall Dutt in the matter of (1870) 1 Cal [illegible]8 Gonesh Sunder Dutt in the matter of (1870) I L R 418 Sreeter Ire Nath in re (1881) [illegible] Calc 108

[7] Damodhar v Malhari (1883) 7 Bom 106

[8] Chattar v Newal Singh (1890) 12 All 64

ATTACHMENT

Property liable to attachment and sale in execution of decree

60 (*1*) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf

Provided that the following particulars shall not be liable to such attachment or sale, namely —

(*a*) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ,

(*b*) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ,

) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ,

) books of account ;

ure right to sue for damages ,

f personal service ,

l gratuities allowed to pensioners of nment, or payable out of any service sion fund notified in the Gazette of

India by the Governor General in Council in this behalf, and political pensions,

(h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty,

(i) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of—

(i) the whole of the salary, where the salary does not exceed twenty rupees monthly,

(ii) twenty rupees monthly, where the salary exceeds twenty rupees and does not exceed forty rupees monthly, and

(iii) one moiety of the salary in any other case,

(j) the pay and allowances of persons to whom the Indian Articles of War apply,

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment,

(l) the wages of labourers and domestic servants, whether payable in money or in kind,

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest

(n) a right to future maintenance,

(o) any allowance declared by any law passed under the Indian Councils Acts, 1861 and 1892, to be exempt from liability to attachment or sale in execution of a decree, and,

(p) where the judgment debtor is a person liable for the payment of land revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation —The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable

(2) Nothing in this section shall be deemed—

(a) to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land, or

(b) to affect the provisions of the Army Act or of any similar law for the time being in force

Act XIV of 1882, s 266 This section applies to H C, and also to Prov S C C, except so far as it relates to immoveable property As to Oudh, see Act XVIII of 1876, s 20 As to Ajmere see Reg I of 1877, s 26 See also the Indian Marine Act, XIV of 1887, s 81 and the Army Act 1881, 44 & 45 Vict, c 58, s 151.

Profits of Property —When a party attaches property he also attaches the profits thereof, but if he allows the original owner to remain in possession and enjoy the profits, they cease from the moment they find their way into the pockets of the owner to be specially liable for the judgment debt under the attachment [1]

Disposing power —A cover containing notes in the Post Office is in the disposing power of the addressee [2] but the trustee of a religious endowment has not a disposing power over the corpus of the estate [3] The money payable to an auctioneer by purchasers of goods entrusted to him cannot be attached by the creditors of the auctioneer, except as to such an amount as the judgment debtor has a disposing power over, exercisable for his own benefit [4]

Non-alienable —And where land was assigned to a widow for her maintenance with a proviso against alienation or charging it was held that she had no saleable interest in the usufruct [5] But see *Bansidhar v Gulab Kuar*[6] in which the question as to whether villages assigned to a Hindu widow in lieu of her maintenance can be attached or not was left undecided An interest in the income of immoveable property assigned by way of maintenance to a Hindu widow by the members of her family is not capable of being attached and sold in execution of a decree against the widow,[7] but where property was devised with a clause that it should be held impartible, the debtor's share was allowed to be attached [8] The income of property belonging to a married man subject to restraint or anticipation is not attachable [9]

For his own benefit —These words do not prevent an attachment in a suit against the father of a Hindu family affecting the interests of his sons [10]

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[1] Ram Coomar v Gobind Nath, (1869) 12 W R, 391

[2] Narasimhulu v Adiappa, (1890) 13 Mad, 242

[3] Bishen Chand v Nadir Hossein (1888) L R, 15 I. A, 1, (1888) 15 Calc, 329

[4] Smith v. Allahabad Bank, (1901) 23 All, 135

[5] Diwali v Apaji, (1886) 10 Bom, 342

[6] Bansidhar v Gulab Kuar, (1894) 16 All, 443.

[7] Gulab Kuar v Bansidhar, (1893) 15 All, 371

[8] Narayanan v Kannan, (1884) 7 Mad, 315
Gondain v Vencatesa (1906) 30 Mad, 378

[9] ...gabhai v Vijbhukandas, (1887) 11 Bom, 37

Other saleable property—A decree of Court is property within this section,[1] but account books are not,[2] though if a judgment debtor attempts to make away with his account books in order to defeat the creditor, the Court may require him to produce them and leave them in the custody of the Court [3] A lease which prohibits alienation by sale or gift may be sold in execution of a decree [4] A judgment debtor having been in possession of property for more than 12 years, has a title by adverse possession which is capable of being attached [5] So also his property, even though it be the subject of an existing suit [6] A vested remainder in a house is attachable and saleable under this section [7] Spears and daggers are goods A Nazir may sell arms in execution of his duty [8] A life interest in trust funds under a settlement of which the Official Trustee is the trustee can be attached [9]

Portions of property—The doors and windows of a building cannot be separately attached [10] A portion of a saleable tenure cannot be sold for arrears of rent [11] An attachment of a portion of a *bhag* in execution of a decree obtained in a mortgage of such portion is illegal Such portion of a *bhag* cannot be sold [12]

Equity of redemption—The equity of redemption in mortgaged property can be attached and sold in execution of a decree against the mortgagor [13] unless the person applying for attachment and sale is also mortgagee [14] The debtor's interest in money or other securities deposited by him as a security for the performance of his duty is saleable [15]

Partnership—In a partnership suit the accounts were submitted to arbitration *held*, the claim under the award before award made was not property that could be attached [16] The share held by the judgment debtor in the assets of a partnership business with the decree holder the business being in the hands of the Receiver of the Court under a decree for dissolution and winding up, cannot be attached [17] nor can the share in the undivided assets be attached,[18] but where

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1 Gholam Mahomed v Indrachand Jihuri (1871) 7 B L R, 318, *contra*, Tiruvengada v Vythilinga (1883) 6 Mad 418 and see note on Order XXI, r 53 *post*

2 Jestanji Cursetji Shroff *in re* (1865 7) 3 Bom H C 42

3 Adjoodhya Pershad v Middleton (1871) 3 All H C 334, Bhoza Rughbur v Bhoza Raj (1871) 3 All H C 319

4 Golik Nath v

5 Suja Hossein v

6 Ram Chunder

7 Annaji Dattatr

8 Wala Hiriji v

9 Abdul Lateef v

10 Peru Bepari v Ronuo Maifarash (188?) 11 Calc, 164 See also Queen Empress v Ibrahim (1890) 13 Mad 518 Purushottama v Municipal Council of Bellary (1891) 14 Mad 467

11 Reily v Huro Chunder (1882 3) 12 C L R, 398

12 Narbheram v Collector of Broach (1898) 22 Bom, 737

13 Gossain Muniaji v Deen Dyal, (1873) 20 W R, 20, Saraswati Debi v Nabidwip (1870) 5 B L R 380, Parashram v Govind Ganesh, (1897) 21 *Bom* 226

14 Bhugg Butty Dossee v Shama Churn, (1876) 1 Calc, 337, Dosibai v Ishvardas, (1891) 15 Bom 222 L R, 18 I A, 22, Kamini Debi v Ram Lochun Sircar, (1870) 5 B L R 450 but see Khub Chand v Kalian Das (1876 8) 1 All, 240

15 Karuthan v Subramanya (1886) 9 Mad, 203

16 Tuffuzzool Hossein v Rughoonath, (1871 2) 14 Moo I A, 40

17 Abbott v Abbott and Crump (1870) 5 B L R, 382, Karimbhai v Conservator of Forests (1880) 4 Bom, 222

18 Dwarika Mohun v Luckhimoni (1887) 14 Calc, 381, otherwise, in Madras—Parvatheesam v Bapanna (1890) 13 Mad, 447, see also Bainbridge, *in re*, 8 C D, 218 Tuffuzzool Hossein v Rughoonath (1871-2) 14 Moo I A, 40, p 51

a decree holder attached and seized certain goods which belonged to the judgment debtor in partnership with another person, who alone at the time of attachment was in actual possession it was held that such attachment must be limited to the share of the judgment debtor, and should not be by nominal seizure but by prohibitory order[1] *The share of a partner in partnership business is* saleable property[2]

Receiver —Property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the mofussil[3]

Tenant's interest —Plaintiff permitted B to erect a thatched house with mud walls on his land and dwell in it for forty years it was held that B had a saleable interest in the house and land[4] Where a tenant has an hereditary interest in property it can be attached[5] *An occupancy holding which is not saleable* by custom or usage cannot be sold in execution of a decree executed under the Civil Procedure Code[6]

Goods sold —Where A contracted to lay down a certain quantity of pavement for B and having carted paving stones to the works to the value of Rs 100, received an advance of that sum from B *held* that the materials had vested in B as purchaser and could not be attached under a decree against A[7]

Hindu family The interest of an undivided member of a Hindu family *subject to Mitakshara law is liable to attachment, the purchaser should sue for* partition[8]

Contingent right in —Where A was only entitled to a life interest in the residue of the real and personal property of B after all charges had been satisfied and full administration had taken place *held*, his interest could not be sold in execution[9]

Tenant's trees —Trees growing on the lands of an ex proprietary tenant in the North West cannot be sold[10]

Transfer of Property Act —As to what property may be transferred see s 6 Act IV of 1882 The right to claim specific performance of an agreement to transfer land is attachable[13]

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[1] Dhama Singh v Kali Das Pox (1870) 5 B L R 386

[2] Jagat Chunder v Iswar Chunder (1893) 20 Calc 693

[3] Hem Chunder v Prankristo (1876) 1 Calc 403

[4] Doorga Pershad Misser v Brindabun Sookul (1871) 7 B L R 159 (1871) 15 W R 274

[5] Ramessur v Golamee Sahoo (187) 21 W R 309

[6] Durga Charan v Kali Prasanna (1898 9) 3 Calc W N 586 (1899) 26 Calc 727, Ebram Ali v Gopikanth (1897) 24 Calc 355, (1896) 1 Calc W N 396

[7] Reference (1870) 2 All H C, 337

[8] Jalli lar Singh v Ram Lal (1879) 4 Calc, 773 Deendyal v Jugdeep Narain, L R, 4 I A, 247 (1878) 3 Calc 198 Rai Narain v Nownit Lal (1879) 4 Calc 809 As to the effect of such an attachment see Madho Prashad v Mehrban L R, (1889 90) 17 I A 194 p, 196 (1891) 18 Calc 157

[9] Tokai Sherob v Beglar (1849 57) 6 Moo I A 510

[10] Jugal v Deoki (1887) 9 All, 88

[11] Denobundhoo v Shushi Mohun (1882 3) 12 C L R, 60

[12] Jitmal v Pamchand (190) 7 Bom L R, 488

[13] Pudra Perkash v Krishna Mohun (1887) 14 Calc 241

Religious trust —The right to manage a religious trust,[1] or a religious office,[2] or to officiate at the worship conducted in a temple,[3] is not saleable nor can any portion of the corpus of the trust property be taken out of the hands of the trustee [4] A priestly office with emoluments attached cannot be transferred either by private sale, or by sale in execution of a decree [5] Offerings which may in future be made to a Hindu idol and the right to receive such offerings are not saleable [6]

Cattle as may in the opinion of the Court —Only beasts declared to be *necessary by the Court are exempted* [7]

Necessary wearing apparel —There is nothing in the law to exempt property in a *zenana* from attachment[8] but ornaments on the person of a Hindu wife, forming part of her stridhan, cannot be taken in execution of a decree against her husband On certain occasions, under Hindu law, a husband may take them, but his right is a personal one [9] Under Act XIV of 1882, ordinary trinkets such as neck ornaments, cannot be seized for a woman's debt[10] and in sub section (*a*) all such personal ornaments as are in any way connected with religious usage are expressly excepted

Materials of house —*This means a house occupied by an agriculturist in that capacity* [11] This provision does not prohibit the sale of property specifically mortgaged, although the property be materials of a house belonging to or occupied by an agriculturist [12] A rent decree has priority over an ordinary money decree, if executed against the house for which the rent was claimed [13] The

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Right to sue for damages —It has been held generally that the right to bring a suit or prefer an appeal cannot be attached and sold [18] But if a decree has

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1 Ayancheri v Acholathil (1882) 5 Mad 89

2 Kuppa Gurukal v Dorasami Gurukal, (1883) 6 Mad, 76

3 Durga Bibi v Chanchal Ram (1882) 4 All, 81 following Rajah Vurmah v Ravi Vurmah (1877) L R 4 I A, 76, see Khetter Chunder v Hari Das, (1890) 17 Calc 557

4 Bishen Chand v Nadir Hossein (1888) 15 Calc 329 (1887 8) L R, 15 I A, 1 See also Moheeput Singh v Shaikh Fibaree, (1873) 19 W R, 226

5 Mallika Dasi v Ratan Mani Chakervarti (1896) 1 Calc W N, 493

6 Sheilojanund v Peary Charan Dey (1902) 29 Calc 470, (1902) 6 Calc W N, 723 See "ANY RIGHT OF PERSONAL SERVICE" p 23, *infra*

7 Bakhir Mohammed v Durga Churn (1882 3) 13 C L R, 200, (1884) 10 Calc, 39

8 Doorga Churn v Huree Mohun (1869) 17 W R 86.

9 Tukaram v Gunaji, (1871) 8 Bom, H C, A C J, 129

10 Appaua v Tangamma (1887) 9 Bom, 106

11 Bai Hansa v Abdulla (1905) 7 Bom L R, 684.

12 Bhagwandas v Hathibhai, (1880) 4 Bom, 25

13 Manaklal v Lakha (1880) 4 Bom, 429

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17 , 588 *Agricultural*

18 Bipro Protap v Deo Narain, (1865) 3 W R, Mis, 16, Arratoon v Puna Lall, (1870) 14 W R, 152, Tuffuzul Hossein v Raghunath, (1871) 7 B L R, 186; 14 Moo I A, 40, Shyam Chand v Land Mge Co, (1873 4) 12 C L R, 440, (1883) 9 Calc, 695.

been passed, it is capable of being attached and sold in satisfaction of the debts of the decree holder [1] "Damages" includes mesne profits [2]

Land acquisition compensation — Money in the hands of the Collector as compensation for lands taken up for public purposes cannot be attached in execution of a mortgage decree Claims to such compensation must be made before the Collector [3]

Debts — A debt is a liquidated money obligation for which speaking generally, a suit will lie,[4] and probably as is the rule in England since the Judicature Act, there is no distinction in this country between legal and equitable debts [5] But as the sum must be liquidated, unliquidated damages after verdict do not constitute a debt unless judgment has been given so as to make it a judgment debt [6]

Debts are of two kinds payable at present, and payable in future In England they are called 'owing and accruing' [7] This division was known before Act VIII of 1859 and is probably sound under the Code In the case of Tuffazul Hossein *v* Raghunath,[8] their lordships of the Privy Council said in regard to the law before Act VIII of 1859 —"It appears plainly that a mere expectancy or a mere right of suit cannot be attached, that the attachment must operate at the time of attachment and not be anticipatory so as to fasten on some future state of property in which the suit may result Thus if the land of A be held by A subject to an option in B to take it at a definite price or sum, the attachment must be of the land and not of the price An existing debt, though payable at a future day may be attached whilst a salary, wages, or money claim accruing due may not A debt acknowledged, though not recoverable because the charge given to secure it was not registered is within the section A prohibitory ord[illegible] payable [9] Public [illegible] description of the [illegible] or wages, rent, or an annuity is not a debt [10] Otherwise if the sum is owing [11] for money owing by a person who cannot refuse to pay it is a debt [12]

A thing incapable of being estimated or valued, such as "all the claims of Ramanath against all his debtors cannot be attached [13] So, where A for valuable consideration contracted with B to satisfy a decree outstanding against him, and instead of carrying out his agreement, purchased the decree, executed it and brought B's property to sale it was held that the purchaser of B's right under the contract had no title to relief for the breach [14]

Claims over which no Court in British India has jurisdiction, are not debts liable to be attached under this section, though the mere circumstance that the

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[1] Golam Mahomed *v* Indra Chand Johuri (1871) 15 W R 34 7 B L R 318 See 'Other Saleable Property' p 231 *supra*

[2] Shyam Chand *v* Land Mge Co (1883) 9 Calc 697

[3] *Basa Mal v Tajammul Husain (1894) 16 All 78*

[4] Webster *v* Webster, (1861) 31 Beav 393

[5] Webb *v* Stonton, (1882 3) 11 Q B D 518

[6] Randall *v* Lithgow, (1883 4) 12 Q B D 525, Jones *v* Thompson, (1858) 27 L J R 234, and see the cases under 'Right to sue for Damages', *supra*

[7] Tapp *v* Jones (1874 5) L R, 10 Q B 591

[8] (1871) 7 B L R, 186 14 Moo I A, 40, See also Hari Das *v* Baroda Kishore (1899 1900) 4 Calc W N, 87, (1900) 27 Calc, 38

[9] Maharani Dambar *v* Rai Sham (1905) 9 C W N 703

[10] Hall *v* Pritchett (1878) 3 Q B D 215, Webb *v* Stonton *supra*

[11] Mitchell *v* Lee (1866 7) L R 2 Q B 259

[12] Booth *v* Trail (1883 4) 12 Q B D 8 at p 10

[13] Tuffazul Hossein *v* Raghunath, (1871) 7 B L R, 186

[14] Mahomed Hadee *v* Sheo Sevuk, (1873 4) 6 All H C, 95

garnishee is at the time of the application for attachment beyond the limits of British India would not of itself render the debts not liable to be attached [1]

A Railway Company sanctioned a gratuity to A the money was in the hands of the paymaster *held* it could not be attached as the gift was not complete, and there is no debt due

The judgment creditor who attaches is not an assignee and is subject to any equities against the debtor [3]

Whether arrears of interest due on a Government promissory note, blank endorsed and payable to bearer under the terms of the instrument, is a debt seizable is not quite clear [4] Where money is due by an agent or vendee to his principal or vendor the principal or vendor's claim against his agent or vendee may be attached and sold in execution of a decree against the principal or vendor is a debt and it is not necessary that the exact amount due to the principal should be ascertained prior to attachment and sale [5] But the right or interest which the vendor of immoveable property has in the purchase money, where it has been agreed that the same shall be paid on the execution of the conveyance, is not, so long as it has not been executed, a debt, but a mere possible right or interest and so not liable to attachment [6]

Pre-emptive price —The holder of a decree for pre emption paid the pre-emptive price into Court A creditor of the decree holder applied for attachment of the money so paid in and was allowed by the Court to withdraw a portion of it After the decree for pre emption had been confirmed in appeal, the pre emptor applied for possession of the pre empted property *held,* the decree holder was entitled to obtain possession and that it was not competent to the Court to pay out to any one but the person entitled to it under the decree for pre emption any portion of the pre emptive price, so long as the decree for pre emption was not modified or reversed in appeal [7]

Any right of personal service —*Birth Moha Bramince*, or the right to officiate at funeral ceremonies cannot be attached, inasmuch as it is a thing intangible, impartible and incapable of transfer ,[8] nor is the *apadhikpana vritti* of the Godavari in Nasick [9] A *vritti* is a right of personal service and cannot be sold in execution of a decree though private alienations are not absolutely prohibited [10] But a *vritti* can be sold, if a decree of a Civil Court expressly declares that a person's right in it shall be sold [11] Similarly, the right of the shebait of a Hindu idol to perform the services and receive the remuneration is not subject to attachment [12] and if sold, the purchaser would have no interest as against the next shebait ,[13] but if he is paid by the proceeds of landed

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[1] Chimshamlal v Bhansali (1881) 5 Bom 249

[2] Janki Das v L I Ry Co , (1884) 6 All 634

[3] Megji v Ramji (1871) 8 Bom H C 169

[4] Bysack v Buttye 1 Tay and Bell 313

[5] Madho Das v Ramji Patak, (1894) 16 All , 286

[6] Ahmaduddin v Majlis Rai, (1880 1) 3 All , 12

[7] Abdus Salam v Wilayat Ali, (1897) 19 All , 256

[8] Jhummun v Dinoonath, (1871) 16 W R , 171

[9] Ganesh Ramchandra v Shankar, (1886) 10 Bom , 395, Govind Lakshman v Ramkrishna, (1888) 12 Bom , 366

[10] Rajaram v Ganesh (1899) 23 Bom , 131

[11] Sadashiv v Jayanti, (1884) 8 Bom , 185

[12] Dubo Misser v Srinibas Misser (1870) 5 B L R , 617; Kalee Churn v Bungshee Mohun, (1871) 15 W R , 339, 6 B L R , 727 , Juggurnath Roy v. Kishen Pershad, (1867) 7 W R , 266, Mancharam v Praushankar, (1882) 6 Bom , 309 Narasimma v, Anantha (1882) 4 Mad , 391, Kuppa v Dorasami, (1882) 6 Mad 76, compare Khetter Chunder v Hari Das, (1890) 17 Calc , 557

[13] Trimbak v Narayan, (1883) 7 Bom , 188

property and there is a surplus after providing for the worship of the idol, that interest can be attached,[1] provided the extent of interest is decided in a suit to which all the persons interested are parties [2] but apparently the purchaser would not be entitled to enter on the lands [3]

Ghatwali tenures —Ghatwali tenures are not liable in the hands of a ghatwal for the debts of his father See 'SERVICE TENURE' *post* Future rents and profits that may become due to a ghatwal cannot be attached in execution of a decree against him [4]

Stipends, &c This clause includes all pensions of a political nature paid directly by the Government [5] Stipends allowed to military and civil pensioners of Government and political stipends allowed by Government to the members of the Mysore family cannot be attached [6] nor can the stipends granted to the descendants of Azeem oo Dowlah, the Nawab of the Carnatic,[7] so the arrears of *ir mah* pension due to a deceased zemindar are not liable to attachment [8] so also it has been held that an allowance fixed under Act XI of 1843 (B m) cannot be attached in the hands of the Collector or other disbursing officer but that as soon as it is in the hands of the hereditary officer himself it is deprived of any special protection [9]

Government pensions —A person who is only entitled to a gratuity falls within the exemption [10] A bonus in addition to pension is not attachable [11]

Where a pensioner died the balance of his pension unpaid at the time of his decease was held not to be liable to attachment [12] A grant of an annual sum made by Government as compensation for loss sustained by the grantee on account of improper resumption of rent free land is not a pension and may be attached [13] A zemindari granted not revenue free by Government is not a pension and its alienation is not prohibited by this sec [14] A *Tora garas hak* is not exempted from attachment by s 11 of the Pensions Act of 1871 [15]

Private pensions —Can be attached as debts but the sums attached must not be inchoate but arrears existing and definite [16] When a person made over property to the Court of Wards partly in consideration of a present payment and partly in consideration of an annuity payable to the vendor, such annuity was capable of being attached in execution of a decree against the vendor [17]

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[1] Ashutosh Dutt v Doorga Churn Chatterjee (1878 9) I R 6 I A 182, Lathikar v Wagle (1882) 6 Bom 596

[2] Bishen Chand v Nadir Hossein (1887 8) L R 15 I A 1, 15 Calc 329

[3] Sib Churn Doss v Bonnerjee, 1 Boulnois 73 Juggut Soondery Dossee v Bysack, 1 Boulnois 209

[4] Uday Kumari v Hari Lam (1901) 28 Calc 483

[5] Bishambar Nath v Imdad Ali (1889 90) L R, 17 I A 181 (1891) 18 Calc, 216 Muthusami Nadar v Prince Aligia Manavala (1903) 26 Mad 423

[6] *Mohamed v Mohamed* (1867) 7 W R, 169

[7] Mahomed Abdul v Comandur Ramasamy, (1868 9) 4 Mad H C, 277

[8] Referred Case (1869 70) 5 Mad H C, 371

[9] Gunpatlal v Sampatram (1873) 10 Bom H C, 400

[10] Bawan Das v Mul Chand, (1884) 6 All, 173

[11] Muhammad Khasim v Carler, (1882) 5 Mad, 272

[12] Valia Thamburatti v Anujani Kunhunni, (1903) 26 Mad, 69

[13] Jibar Krishna v Sripati Charan Dey (1903 4) 8 Calc W N, 665 See also Pensions Act (XXIII of 1871) s 11

[14] Lachmi Narain v Makund Singh (1904) 26 All, 617

[15] Secretary of State v Khemchand, (1880) 4 Bom, 432

[16] Taffuzal Hossein v Raghunath (1871) 7 B L R 186 pp 195 96, 14 Moo I A 40 Bhoyrub Chunder v Madhub Chunder, (1880) 6 C L R, 19

[17] Harshankar v Baijnath Dass (1901) 23 All, 164

Salary of a public officer or of the servant of a railway company—It can be done in advance [1] and to the extent of half the actual salary [2] The salary of a telegraph officer which is due for past services is a debt which may be attached [3] The wages of a private servant cannot be attached in whole or in part before they become due and a debt exists [4] Apart from the special provision of this Act, any money given by Government to its servants not only for past, but also as a return for future, service cannot be attached Thus, the pay of a Government official is not attachable [5] nor is half pay, as the money is, to some extent received for future services but money actually due solely in respect of past services, such as a pension, is liable to sequestration [6]

A Khot is not a public officer, nor is the percentage he receives for collecting the assessment on lands 'salary' [7] The attachment upon the salary of a railway servant ceases to be operative after he has filed his petition in insolvency and should be withdrawn on notice being given of the making of the vesting order [8] The exemption to the attachment of stipends pensions salaries, &c, prescribed by part (g) of this section does not extend to decrees for alimony, which may now be executed to the extent of one moiety of the exempted pensions and allowances

Indian Articles of War—The Indian Articles of War, (Act V of 1869), amended by Act XII of 1894 apply only to soldiers and followers of the Native Army By arts 182 and 183 of these Articles of War, as well as by proviso (i) of this section the pay and allowances of persons subject to them, as well as of Indian reservists, when actively employed, are absolutely protected from attachment

Military Officers—The Army Act (44 and 45 Vict, c 58) ss 136 and 144 formerly protected the pay of a soldier from attachment But s 136 has been amended by the Army Annual Act of 1895 which now provides that the pay of an officer or soldier of his Majesty's regular forces shall be paid without any deductions other than the deductions authorised by this or any Act or by any Royal Warrant for the time being or *by any law passed by the Governor General in Council* This amendment has had the effect of rendering a moiety of the [illegible]

him, but the operation of the attachment must be restricted to pay received from the Indian Government This is correct but it was further held that the pay of an officer of the Regular Forces is not so subject to attachment For the reasons assigned above, this is not correct See also Order xxvii, r 8

Labourers—Labourers are persons who earn their daily bread by personal manual labour, or in occupations which require little or no art, skill, or previous education [11]

[1] Bhoyrub Chunder v Madhub Chunder, (1880) 6 C L R, 19
[2] Beard v Egerton (1883) 6 Mad, 179
[3] Hussen Bhamjee v Hicks (1872) 18 W R, 124
[4] Ayyavayyar v Virasami, (1898) 21 Mad, 393.
[5] Rajbullub Seal v Mackenzie, (1845) Fulton, 82
[6] Dent v Dent, (1865 9) L R, 1 P & M, 366 As to the form of the order to get at the pension—See Willcock v Terrell, (1878) L R 3 Ex D, 323
[7] Ravji v Sayajirao, (1889) 13 Bom, 673.
[8] Donoghue, in the matter of, (1895) 19 Bom, 232.
[9] Watson v Lloyd, (1901) 25 Mad, 402
[10] Calcutta Trades Association v Ryland, (1897) 24 Calc, 101, 1 Calc W N, 138
[11] Jechand Khusal v Aba, (1881) 5 Bom, 132 See 33 and 34 Vict, C 30 (The Wages Attachment Abolition Act, 1870).

Domestic servant.—See[1]

An expectancy of succession.—This clause would include the right and title of the next heir on the death of a Hindu lady having only a life interest,[2] or on the death of his father,[3] and the life-interest of a judgment-debtor in the residue of the property of a testator after full administration thereof,[4] but not those of Mahomedans taking under a deed of settlement by which a husband granted the lands in dispute to his wife on condition that, if she had a child by him, the grant should be taken as *mokurrari* and if not, a life *mokurrari* to her with remainder to the sons;[5] or of a son under Mitakshara law, whose rights co-exist jointly with his father from his birth,[6] or of a grandson under that law.[7] In Madras, where the interest of an undivided member in the joint property of a Hindu family is attached for his personal debt, and he dies pending the attachment, a valid charge is created in favour of the judgment-creditor which will prevent the accrual to the other co-parceners of the right of survivorship.[8] The reversionary right of the person who makes a gift of a plot of land to a Hindu widow for her maintenance is a vested right in the land, and as such, is capable of being attached and sold.[9]

Pre-emptor.—The interest of a successful pre-emptor who has not paid the pre-emptive price is saved from attachment by clause (m).[10]

Right to future maintenance.—Although a mere right to a future maintenance cannot be attached,[11] arrears due can.[12] But it has been held that if *an instalment of maintenance payable under a decree is about to become due*, the Court may make an order for the non-payment of such instalment by the party chargeable and its non-receipt by the judgment-debtor, or may make an arrangement for the collection or administration, if necessary, of the amount of the maintenance;[13] and that an annuity which is a charge on an estate can be attached in payment of debts due to the person who has inherited the estate from his grantor, and by whom such annuity is now payable;[14] so also where a deed grants a regular maintenance payable from the grantor's estate and

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[1] Dhanno Strang v. Upendra Mohan (1871) 8 B. L. R. 244.

[2] Ram Chunder v. Dhurmo Narain (1871) 15 W. R. (F. B.) 17 B. L. R. 341; Koraj Koonwar v. Komul Koonwar (1866) 6 W. R. 4.

[3] Gour Surun v. Ram Surun (1867) 8 W. R. 233.

[4] Jokai Sherob v. Beglar (1849-57) 6 Moo. I. A. 510; (1866) 4 W. R. P. C. 87.

[5] Umes Chunder v. Zahoor Fatima (1889-90) L. R. 17 I. A. 201.

[6] Tuffazul Hossein v. Raghunath, (1871) 7 B. L. R. 186, p. 196.

[7] Jogul Kishore v. Shib Sahai, (1883) 5 All., 430. As to the right of a purchaser at a sale under such an attachment in the case of a Hindu member of a joint family, see Deen Dyal v. Jugdeep Narain (1877) *L. R. 4 I. A. 247*: 3 Calc., 198. See Anandibai v. Rajaram (1898) 22 Bom. 984.

[8] Bailur Krishna v. Lakshmana, (1882) 4 Mad., 302.

[9] Kachwain v. Sarup Chand, (1888) 10 All., 462. See as to a future interest—Ahmaduddin Khan v. Majlis Rai, (1880-1) 3 All., 12.

[10] Gorakh Singh v. Sidh Gopal (1906) 28 All. 383; (1906) A. W. N. 69.

[11] Duloon Koonwur v. Sungum Singh, (1867) 7 W. R., 311; Monessur v. Nishen Protab, (1875) 23 W. R., 427; Hari Das v. Baroda Kishore, 4 Calc. W. N., 87: 27 Calc., 38.

[12] Kasheeshuree Debia v. Greesh Chunder, (1866) 6 W. R., Mis., 64; and see the remark of Sir Barnes Peacock in Ashutosh Dutta v. Doorga Churn (1878-9) L. R. 6 I. A., 182, p. 183; Hoymobutty Debia v. Koroona Moyee, (1867) 8 W. R. 41.

[13] Monessur Doss v. Beer Protap (1871) 15 W. R., 188; 6 B. L. R., 616; Chukowree v. Numoodhi, (1875) 24 W. R. 5.

[14] Mahtab Chand v. Dhun Coomaree, (1872) 17 W. R., 254.

recoverable in Court on non-payment, such allowance is property which can be attached [1] So can an annuity given by will [2]

Malikana rights —An attachment of *malikana* rights payable for ever, is only good so far as it relates to any specific amount then due or likely to become due [3]

Non-saleable property —Property may be attached, though it may not be liable to sale without a separate suit [4]

Prior attachment onus of proof —If at the date of an assignment of a decree, the judgment debtor's property is already under attachment in execution of such decree, it is not necessary for the assignee of the decree to apply for a fresh attachment When either the decree holder or his assignee applies to have attachment under the decree of property which has previously been attached under the decree, it lies upon the decree holder or his assignee, if the question is raised to show that the second application was unnecessary by reason of the first attachment still subsisting Failing such evidence a Court may presume that the prior attachment had ceased before the application for a second attachment was made [5]

Partial exemption of agricultural produce

61 The Local Government, with the previous sanction of the Governor General in Council, may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment debtor and his family shall, in the case of all agriculturists or of any class of agriculturists be exempted from liability to attachment or sale in execution of a decree

This is a new provision and the exemption is intended to extend to produce which has been hypothecated [*Vide* Report of Second Committee]

Seizure of property in dwelling house

62 (*1*) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling house after sunset and before sunrise

(*2*) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be

[1] Enaet Hossein v Nujeeboonissa, (1869) 11 W R, 138 But see Koomaree Dabea v Greesh Chunder Lahoory, Marsh 200 See also Salamat v Luckhi, (1884) 10 Calc, 521

[2] Gopal Lal Seal v Marsden (1906) 10 Calc W N, 1102

[3] Nilkunto v Hurro Sooderee, (1878) 3 Calc, 414

[4] Chundra Nath Dey v Burroda Shoondury Ghose (1895) 22 Calc, 813; Gouri Shunkur Pandey v Abhoyessury Dabi, (1896 7) 1 Calc W N, xliv

[5] Suleman v Abdullah, (1884) 16 All, 133

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw, and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing he may enter such room for the purpose of seizing the property using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal

Act XIV of 1882 sect 271 This section applies to H C and Prov S C C

It seems by implication to introduce an authority to break open the outer door of a judgment debtor's own house but has not gone so far as to extend this new right to the house of a stranger in which the debtor may be discovered

Trespass A judgment creditor who attaches property which does not belong to his judgment debtor commits a trespass for which he is responsible in damages measured by the value of the property on the date of attachment,[1] even though he may have acted without motive and mistakenly [2] Every person who directs orders or procures the commission of a trespass is liable as a wrong doer and trespasser and under a system where any remedy against the officer executing the powers of the Court would be utterly nugatory it is peculiarly necessary not to relax the rule as to the liability of the decree holder for his own acts or those of his agents in causing the decree to be executed [3] A warrant authorizes the attachment of the goods of A, if the decree holder points out to the officer of the Court, and causes him to attach and remove the goods of B as the goods of A, he is a wrong doer and cannot in any way justify his proceedings under the warrant In causing B's goods to be attached and taken out of his possession, he procures a trespass to be done to B If a man for his own profit and advantage wrongfully and without any warrant of law trespasses upon the land of another, takes away his goods, or procures his goods to be seized and taken out of his possession he is responsible, even though he acts honestly or mistakenly A party to a suit is liable, if by his order the officer takes the goods of the wrong person, a stranger, in execution and in like manner he is responsible if his attorney or agent in taking a step necessary to enable his client to get the fruits of a decree, inadvertently or ignorantly causes the person or property of a stranger to be seized by the officer of Court [4]

Limitation —In a suit for damages time runs from the date of attachment [5]

Pardanasheen —This section does not apply to the arrest of a *pardanasheen* lady [6]

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[1] Kissori Mohun v Harsukh Das, L R, (1890) 17 I A, 17 17 Calc, 436

[2] Dam[illegible] J, 177, and compare Vana Jag[illegible] 46 and in Kanai Prasad [illegible] decree holder as well as the pu[illegible]

[3] Suljan v Sariatulla (1869) 12 W R 329 3 B L R 414, Goma Mahad v Gokaldas (1879) 3 Bom, 74 See also Rajbullub Gope v Issan Chunder, (1867) 7 W R 300 which was distinguished and explained

[4] Goma v Gokaldas (1879) 3 Bom, 74

[5] Goma v Gokaldas (1879) 3 Bom 74, Mudvirapa v Fakirapa, (1883) 7 Bom, 427.

[6] Kadumbinee Dossee v Koylash Kaminee Dossee, (1881) 7 Calc 19 See ss 55 and 132.

Property attached in execution of decrees of several Courts

63 (*1*) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or where there is no difference in grade between such Courts, the Court under whose decree the property was first attached

(*2*) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees

Act XIV of 1882 sect 285 This section applies to H C and Prov S C C

The effect of the new provision in sub section (2) seems to be to clear up some of the difficulties raised under the corresponding section of the former Code The proceedings of an inferior Court will no longer be vitiated by a contravention of sub section (1)[1] but it is not clear how the rights of two innocent purchasers at sales by two separate Courts are to be determined Under the former Code the buyer at the sale by the Superior Court had the better title but now the proceedings in the inferior Court are expressly saved from the result of contravening the provision of sub section (1)

Application of this section —The section has no reference to the sections of the Code relating to the sale and delivery of property,[3] and it is doubtful whether it refers to immoveable property[4] It does not apply when the conflict is between a Revenue and a Civil Court, so the first sale, by whichever Court it may have been held conveys a good title[5]

Practice —The following decisions, under Act XIV of 1882, may serve as guide under this section

The Court referred to in this section has the sole power of deciding objections to the attachment of determining claims made to the property, of ordering the sale thereof and receiving the sale proceeds, and of providing for their distribution under s 73[6] Where by mistake the property has been sold in the lower Court the property should not be re sold but the superior Court should adopt the sale and distribute the assets realised[7]

Munsif's Court, N W P —In the North Western Provinces, the Court of a Munsif must for the purposes of this section be regarded as of higher grade than a Court of small Causes[8]

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[1] Chiranji v Jawahir (1904) 26 All 538 Kanhayan v Hakutti, (1899) 22 Mad 255 Bhagwan v Chandra (1905) 1 Calc, L J, 97, Har Prasad v Jagan Lall (1905) 27 All, 56

[2] Abdul Karim v Thakordas (1898) 22 Bom, 88 See cases cited in O'Kinealy's Civil Procedure Code 6th Ed 519 520

[3] Chunni Lall v Debi Prasad (1880 1) 3 All 356

[4] Olhoy Churn v Golam Ali (1881) 7 Cal 410 It does,—Chunni Lal v Debi Prasad (1880 1) 3 All 356 Muttukaruppan v Mutturamalinga (1884) 7 Mad, 47

[5] Raghubar Dayal v Banke Lal (1900) 22 All 182

[6] Balir v Saram Lal (1882) 4 All, 3 1, see notes under sect 73

[7] Bykant Nath v Rajendro (1886) 12 Calc, 333, Bhagwan Chandra v Chandra Mal, (1905) 1 Calc L J 97

[8] Ballu Ram v Raghubar Dial, (1894) 16 All, 11

64 Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt dividend or other monies contrary to such attachment shall be void as against all claims enforceable under the attachment

Private alienation of property after attachment to be void

Explanation —For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets

Act XIV of 1882, Sect 276 This section applies to H C and Prov S C C

Effect of attachment —Until there is sale in execution of the judgment debtor's estate the right of property remains to him [1] and attachment does not create any interest or charge upon the properties in favour of the attaching creditor as against other creditors [2] Attachment prevents alienation, but does not confer title [3] but an order of sale in addition to attachment under a mortgage decree creates a valid charge on the property [4] and attachment by a creditor of the interest of a member of a joint family will support a partition [5] An attaching creditor has a right to redeem a mortgage upon the property attached by him,[6] and he may oppose probate of the debtor's will, if the probate has been obtained in fraud of creditors

Increment Quære If, between the time of attachment and the time of sale the interest of the judgment becomes enlarged or accelerated, will it not pass by the sale ?[8]

Death of debtor —If the judgment debtor dies after attachment, his property may be sold without putting his legal representative on the record [9]

Rent co sharer —The attachment of a tenure in execution of a decree obtained by a fractional co sharer for arrears of rent is not such an attachment as is contemplated by s 170 of the Bengal Tenancy Act [10]

Lien —The lien acquired by the judgment creditor under this section is not affected by a mortgage of the property by the judgment debtor after the grant of a certificate under Order xxi, r 82 [11]

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[1] Wagji v ThaThari (1879) 3 Bom 58

[2] Sorlul Chunder v Russick Lal (1888) 15 Calc, 202

[3] Moti Lal v Karrabuldin (1898) 25 Calc 179 1 Calc W N, 639 Peacock v Madan Gopal (1901 2) 6 Calc W N 577 Kristna Sawmy v Official Assignee of Madras (1903) 26 Mad 673 and see sec 73

[4] Siraj Bansi v Sheo Persad (1880) 5 Calc, 148

[5] Madhu Parshad v Mehrban L R, (1889 90) 17 I A, 194, p 196 (1891) 18 Calc, 157 p 161

[6] s 91 Act IV of 1882.

Nilmoni Singh v Umanath (1884) 10 Calc, 19, Kishen Dai v Satyendra Nath (1901) 28 Calc 441

[8] Umesh Chander v Zahur (1891) 18 Calc 164 p 176 L R, 17 I A, 201, and compare Muhammad v Kutub Hussain (1887) 9 All 136

[9] [illegible] ...lina Konwari v Jagat and compare Surendro 108 19 Calc 513 with L R, 17 I A, 150

[10] Beni Madhab v Jaod Ali, (1890) 17 Calc, 390

[11] Gurusami Sami v Venkatsami, (1891) 14 Mad, 277

Where an attachment has been made —An alienation before attachment is good, even though the parties may know that a judgment creditor was seeking to get process of execution against that property provided that such alienation was *bona fide* and for valuable consideration,[1] and a debtor may, although unsatisfied decrees be outstanding against him prior to attachment, give a preference to a particular creditor or class of creditors over others, and this notwithstanding that the effect of the alienation or preference may be to defeat the operation of an anticipated execution [2] The leading case on the subject is that of *Puddomonee* v *Roy Muthooranath* [3] in which their lordships of the Privy Council stated as settled law, that if an attachment has been permanently struck off and a new attachment has become necessary, a conveyance executed between the two attachments is valid, but it was thought doubtful whether, as a consequence of this, a conveyance executed whilst the first attachment was subsist

before or after decree is the same, provided in the former case a decree is made for the plaintiff at whose instance the attachment takes place [5] An assignment by a Hindu widow of her life interest in the profits arising from immoveable property left by her deceased husband after it had been attached under order XXI, r 53 is invalid [6] The object of the section is to make void only transactions prejudicing the execution creditor [7] When a private alienation of attached property is made under such circumstances that it in no way interferes with the rights secured by his decree to the attaching decree holder, this is no bar to such alienation [8] Where a party prosecuting a decree is compelled to take out another execution, his title should be presumed to date from the second attachment [9]

Sale set aside —When an execution sale is set aside on account of irregularity in the proceedings, the attachment remains, so that the decree holder can again bring it to sale [10]

Death of judgment debtor —The attachment does not cease on the death of the judgment debtor,[11] even though the estate passes to the surviving members of a joint Mitakshara family [12]

before an attachment could be relied upon for the purpose of invalidating any

[1] Fegredo v Mahomed Mudessur, (1871) 15 W R, 75, Ram Burun v Janakee Sahoo, (1874) 22 W R, 473

[2] [illegible] Doorga Tewaree v Naipal Lal, (1879 80) 2 All, 173, Sheo Prashad v Miller, [illegible] of 1882

[3] Puddomonee v Roy Muthooranath, (1873) 20 W R, 133, 12 B L R., 411.

[5] Debi Prasad v Baldeo, (1896) 18 All, 123

[6] Ganu Singh v Jangi Lal, (1899) 26 Calc, 531

[7] Natha v Daunbhaiji, (1899) 23 Bom, 1

[8] Dinobundhu Shaw v Jogmaya Dasi, (1902) 29 Calc, 154, 6 Calc W N, 209, L R, 29 I A, 9

[9] Abdul Rashid v Gappo Lal, (1898) 20 All. 421.

[10] Kishen Lal v Charat Singh, (1901) 23 All., 114

[11] Gossain Munraj v Deen Dayal, (1873) 20 W R, 20

[12] Sheo Prashad v Hira Lal, (1889) 12 All., 440, Madho Parshad v Mehrban (1889 90) L R, 17 I A, 194, p 197, 18 Calc., 157

Beni Pershad v Parbati Koer, (1893) 20 Calc, 895.

subsequent alienation it had to be shewn that it had been duly made by a written order issued and published [1]

Existing Decree.—There must be a decree in existence to support the attachment,[2] if the decree is set aside at the date of attachment, the attachment is null and void and a renewed decree in the same terms will not validate it [3]

Time and mode of objecting.—Objections on the ground that the proper formalities have not been carried out must be proved by the party raising them, and cannot be raised for the first time before the Privy Council [4]

Enforceable under the attachment The alienation is null and void only as against the attaching creditor or persons who may acquire under or through the attachment and not as against the whole world,[5] and only so far as may be necessary to effect the execution of the decree,[6] so that if the decree is subsequently satisfied, the alienation is binding on the debtor [7] Thus, where property was attached on non payment of an instalment which was paid by the debtor out of the proceeds of a private sale of the property, it was held that the Court could not continue the attachment so as to ensure payment of instalments not yet payable and the alienation was good [8] So a sale to the creditor[9] or the sale or mortgage of the attached property to pay off the judgment debtor is not void [10] But all these decisions must now be subjected to the Explanation to this section which expressly includes the claims of subsequent execution creditors under section 73 *post* [11]

Purchase by mortgagee.—If a mortgagee purchases privately, and his purchase is void as against the subsequent auction purchaser, he can fall back on his mortgage [12]

Effect of removal of attachment on alienation made during its continuance.—Where there is an existing decree[13] the removal of an attachment does not render an alienation made whilst the attachment was subsisting a valid one, as it could not have a retrospective effect [14] But a *kinom* executed during the subsistence of an attachment which was afterwards removed, on the decree in execution of which the property was attached *being satisfied*, was held to be valid [15] When a Mahomedan by his will bequeaths more than

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[1] Dwarkanath v Ramchunder, (1870) 13 W R, 136

[2] Jagat Narayan v Tulsiram, (1868) 1 B L R, 71

[3] Chettiatil v Kunhi Koru (1906) 29 Mad 175

[4] Ram Krishna v Surfunnissa (1881) 6 Calc, 129

[5] Anund Lall v Jullodhur, (1872) 10 B L R 134 17 W R, 313, 14 Moo I A, 543 Balmokund v Rambhit (1870) 13 W R, 134

[6] Dinendranath v Ram Kumar (1881) 7 Calc, 107 L R, 8 I A, 65

[7] Umesh Chunder v Raj Bullubh, (1881 2) 10 C L R, 204, 8 Calc, 279

[8] Ramdhun v Koylashnath (1869) 12 W R 437 4 B L R, 20

[9] Annamunadiyan v Iyaswamy, (1870 1) 6 Mad H C, 65

[10] Balaji Ramchandra v Gajanan Babaji, (1874) 11 Bom H C, 159, Buldeo Singh v Kanaha (1869) 1 All H C, 25, Dinendronath v Ram Kumar, (1881) 7 Calc, 107, *supra*

[11] This gives sanction to the decision in Sorabji v Govind, (1892) 16 Bom, 91

[12] Gopal Sahoo v Gunga Pershad, (1882) 8 Calc, 530

[13] Juggut Narain v Toolsee Ram, (1868) 10 W R, 99 1 B L R, 71, Joobraj v Buhooria 1880) 7 C L R, 424 p 426

[14] ... 72, 12 B L R 414 note, W R, 56, Ram Churn v ... Puddomonee Dassee v Roy ... , 411, decided by their lord

[15] Kunhi Moossa v Makki (1900) 23 Mad, 478

one third of his whole property to a stranger the consent of his heirs to such bequest although given after the property bequeathed has been attached in execution of a decree against the testator's heirs, does not amount to an alienation prohibited by this section [1]

Private transfer —This does not refer to an alienation effected by a vesting order of the Insolvent Court such an alienation is rather an alienation by operation of law than one by the judgment debtor [2] The renewal of an existing obligation is not an alienation [3]

The effect of striking off an execution case —There is no general rule as to the effect upon an attachment of striking an execution case off the file,[4] it must depend on the circumstances of the particular case [5] It has been held recently that attachment does not cease because the execution case is dismissed for want of prosecution [6]

In the case of *Jhoboo Sahoo* v *Ram Churn* [7] Macpherson, J observed, "I confess that it appears to me that the question whether an execution case has or has not been struck off the file is of little importance as affecting the validity and continuance of an attachment, except in so far as the striking off may be a legal [illegible]

of its own motion and without notice to the parties on any legal ground whatever in no way withdraws or affects the validity of an attachment, and is not binding on the judgment creditor In the case of *Mohesh Narain* v *Kishanund* [9] at page 341, their lordships say 'It would be contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure to hold that when for any reason satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings, as regards that execution are taken off the file the whole suit is discontinued thereby and the further proceedings for the same purpose are to be considered as taken in a new suit If the decree holder at the instance and for the benefit of the debtor consents to a postponment for a certain time to enable the debtor to meet his liabilities on condition that the attachment remains in force and the Court, merely with a view to keep its files clear, strikes off the case such an order striking off the case, which is not a proper order

[1] Daulatram v Abdul Kayum (1902) 26 Bom, 497

[2] Sarkies v Bundho Bree (1869) 1 All H C, 81, Sadayappa v Ponnama, (1885) 8 Mad 574

[3] Mahadevappa v Srinivasa (1882) 4 Mad, 417 As to what is a private alienation see Qurban Ali v Ashraf (1882) 4 All, 219 and compare Nil Madhab v Narattam (1890) 17 Calc, 826

[4] Bhagwati Khetter Moni Dassi (1896 7) 1 Calc W N 617, in this case there was held to be a subsisting attachment see also Mahomed Mozuffer v Kishori Mohun (1895) 22 Calc, 909, L R, 22 I A, 129, where an attachment held to be non subsisting

[5] See Peacock J in Zuhurun v Taylor, (1869) 2 B L R, 86 at p 92 [illegible] Palhimmeon v Muthuramath (1874) 12 B L R, 411

[6] Gobinda v Dwarka (1906) 33 Calc, 666, but see Bin la [illegible] (1874) 21 W R, 68: 14 B L R, 323, and Khadem v Kalee [illegible] (1867) 8 W [illegible]

[7] Jhoboo Sahoo v Ram Churn (1869) 11 W R 517 3 B L R, [illegible] App 131 [illegible] Binauda [illegible] of Ram Kirpal v Rup Kuari (1874) 6 All 269 [illegible] Mohesh Narain v Kishanund [illegible]

[9] Mohesh Narain v Kishanund (1861 3) 9 Moo I A, 324 [illegible] (1870) 1 C L R 475

cannot affect the attachment,[1] and if a Judge has struck a case off improperly, he can restore it again[2] Where the decree holder, when called upon to furnish security before selling the attached property (there was an appeal to the Privy Council), failed to furnish that security, and the execution case was struck off it was held that the effect of that order was to leave intact all the proceedings which had been taken up to that stage[3] Applications to determine mesne profits are to be heard as applications for execution Their striking off does not finally decide them[4] But where attachment having issued on an application for execution of a decree proceedings were on the 31st December, 1873 stayed for a month by consent, and the execution case was "struck off for the presen[illegible] and on the 30th November 1874 a fresh application for *attachment* and *sale* was made *held* that there was no attachment subsisting between the 31st of December 1873 and the 30th of November, 1874[5] Where a property having been attached the execution case was subsequently struck off the file, and the judgment creditor again applied for attachment of the same property, *held* that a private alienation, after the date of such application, but, before attachment was not void[6]

Attachment suspended or removed, revived —Where property has been released from attachment in execution of a decree and in a subsequent suit brought for the purpose a decree is obtained declaring it liable to be attached and sold in execution of the former decree the effect of the decree in the latter suit is to set aside the order which released the property from attachment thus leaving matters as they were before that order was passed,[7] and any alienation in the meantime would be made *pendente lite*[8] So in the case of *Mahomed Warries v Pitambur*[9] in which it was held that the effect of that decree must be to set aside the order of release which had been made, and therefore to make the property still subject to the attachment and to restore the state of things that had been disturbed by the order of release

Attachment pending appeal —An order striking off an attachment pending appeal does not release the property from attachment[10]

SALE

65 Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the

Purchaser's title

[1] Mungul Per[illegible] I A 123 Syam Singh v [illegible] Bani Prosad (1879) 4 C [illegible] W R 205 Da Costa v [illegible] Binda Bibee v Gopeenath [illegible] 3

[2] Zahoorun v Tayler (1868) 10 W R (1868 9) 380 2 B L R 86 Biswa Sonan v Binanda (1884) 10 Calc, 416

[3] Soondur Singh v Buhoora (1875) 24 W R 36 But in Purbhoo Doss v Goma Bhujun (1866) 5 W R Mis 4 it was held that an attachment could not subsist when the case was struck off for neglect to pay in the *talabana* for the service of the necessary sale process

[4] Ram Kishore v Gopi Kant (1901) 28 Calc 242

[5] Gangagotti Pal v Ram Sundar (1881) 8 C L R 157

[6] Zaibunnissa v Jairam Gir, (1876 8) 1 All 616 and as to the general rule see Puddomonee v Muthooranath (1873) 20 W R, 133 (1873 4) 12 B L R 411

[7] Wooma Churn v Kadambini (1878 9) 3 C L R, 146

[8] Dinendronath v Ram Kumar (1881) 7 Calc 107, L R, 8 I A, 65

[9] Mohomed Warries v Pitambar (1868) 9 W R 43 This was followed in Baroniah Rai v Prosunno Narain Chowdhry (1896) 23 Calc 829 See however Krishna Chetty v Rami Chetty (1885) 8 Mad H C 99

[10] Sheo Narain v Miller (1872) 17 W R 231

property is sold and not from the time when the sale becomes absolute

Act XIV of 1882 S 316 This section applies to H C

Sale becomes absolute—There is no provision as to this matter in the body of this Code but Order XXI r 92 prescribes the cases in which the Court shall make an *order confirming the sale* whereupon such sale shall become absolute

Sale Certificate—See certified purchaser sect 66 *post* Order XXI r 93 provides for the grant of a certificate to the purchaser of immoveable property on the sale becoming absolute This section is exactly opposite in effect to the corresponding section of the former Code The title to the property sold is now to vest in the purchaser from the date of the sale For a history of the legislation on this point since 1859 see O Kinealy's C P Code 6th Ed pp 570 571 The uncertified purchaser has always had an equitable interest in the property which when perfected by the certificate was superior to that of any subsequent purchaser,[1] but under the last Code the property vested in the purchaser from the date of confirmation and did not relate back[2] So that the right to mesne profits did not arise until that date[3] although it was indeed held that the purchaser was liable for arrears of rent accruing due between sale and confirmation[4] and he could maintain an action for injury done to the property prior to confirmation[5] This section settles any doubts there may have been on these points by laying down the clear rule that the property is to vest in the purchaser from the date of the sale

The certificate of sale is not the title, it is merely a title deed to the property,[6] and is not conclusive,[7] the grant being a ministerial and not a judicial act[8]

Effect of—All irregularities previous to sale are cured by the issue of a certificate and no regular suit will lie to set aside the sale on account of them,[9] nor can a third party contest its validity[10] But confirmation of sale is no bar to an objection raised to an application for delivery of possession on the ground that the sale was illegal, because the decree could not have the effect of passing an occupancy holding not transferable by custom[11]

Amendment—A sale certificate should not be amended *ex parte*[12] A sale certificate may be amended in review No appeal lay against such an order under the former code[13]

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1 Yeshvant v Govind (1886) 10 Bom 453 Chinnamtiax v Vithiblin (1887) 11 Bom 588, Chiddo v Pearі Lal (1899) 19 All 188, unless he had been guilty of negligence Narjundeppa v Hemaja (1885) 9 Bom, 10

2 Premchand v Purnima (1888) 15 Calc 546

3 Amir Kazim v Darbari Mal (1902) 24 All 475

4 Satyendra Nath v Nilkantha (1897) 21 Calc 383 but see Koruna noyi v Sorendra Nath (1899) 26 Calc, 176

5 Adhur Chander v Aghore Nath (1897) 2 Calc W N 589 in Allahabad, the decisions were similar Jagan v Baldeo (1883) 5 All, 305 at 297 and as to his equitable rights in certain events see Bhawani Koer v Mathura Prasad (1907) 7 Calc L J 1

6 Narayan v Shamrao (1903) 27 Bom, 379

7 Balvant v Hira Chand (1903) 27 Bom, 334

8 Vithal v Vithojirav, (1882) 6 Bom, 586

9 Balkrishna v Masuma, (1883) 5 All, 142 p 157, L R, 9 I A, 182

10 Naigir v Bhaskar, (1886) 10 Bom, 444 See also, Bilkishen v Sikaram, 7 All, 731

11 Durga Charan v Kali Prasanna (1899) 26 Calc, 727, 3 Calc W N, 586

12 Rughoo Nundun v Wilson, (1875) 23 W R, 301

13 Roghu Roy v Ram Kumar (1898) 3 Calc W N 374, 26 Calc., 529 Sadhu Kunwar v Bansi Dhar, (1901) 23 All, 476, Mammod v Locke, (1897) 20 Mad, 487

Mortgage.—Mortgages noted in the proclamation of sale should be entered in the certificate and computed as part of the purchase money if they have been admitted by the parties or established by decree or declared to be charges on the property and the sale has been held subject to them[1]

Construction.—See 'Representative Capacity,' *infra*. The present rule is that in case of doubt as to the meaning of a Sale certificate the whole execution proceedings should be looked at[2]

To whom granted.—The certificate can be granted to the representative of a deceased purchaser[3] or to a creditor of the decree holder who attaches the decree after sale[4]

Evidence.—A statement in a sale certificate granted by a Court that the purchase is subject to a charge is not conclusive evidence against the purchaser, when it is sought to enforce the charge by suit[5]

A sale certificate raises a presumption that the purchase money has been paid[6]

Estoppel.—The acceptance of a sale certificate by the purchaser of a mortgagor's interest in land is not an admission of the mortgagor's title within s 19 of Act XV of 1877[7]

Registration.—Registration is not compulsory and a document merely because it is registered cannot take effect against an unregistered sale certificate[8]

Stamp.—An application by an auction purchaser for a certificate of sale need bear no Court fee stamp[9] The purchaser must procure the stamp Claims admitted by the parties should be taken into account in ascertaining the stamp duty, and they should be entered in the certificate[10] Where property subject to an incumbrance is sold by auction in execution of a decree the sale certificate should be stamped according to the amount of the purchase money together with the incumbrance[11] By s 10 of the Indian Stamp Act the stamp duty is payable not by the deposit of the sum required to purchase stamps but by the stamps themselves

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[1] Shantappa v Subrao Ram Chandra (1894) 18 Bom 175

[2] Mahabir Pershad v Markunda, (1889) L R 17 I A 11 p 14

[3] Vinayak Narayan *in re* (1900) 24 Bom 129

[4] Beharia v Rampertab Mull (1907) 11 Calc W N 158

[5] Rama Chandra v Kassim (1893) 16 Mad 207 If in a suit the sale is admit ... Narain v Biney Madhut (1881) 7 ... he practice in Madras—Salagopa v ... v Kumarasami (1888) 11 Mad 296 ... an v Balkco (1883) 5 All 305 and ... n Bombay—Nagar v Bhaskar (1886) 10 Bom 444

[6] Fyazooddeen v Shumsunnissa (1869) 12 W R, 508

[7] Ambala Vaveri v Naduvakat (1883) 6 Mad, 325

[8] Se ... nded by s 65 (1) and (2) of ... Mad, 248 and 419, 6 Bom, ... nder s 35 of Act II of 1899, ... t has been duly stamped— ... , 136, Harkisan Das v Bai Rakhmai (1873) 10 B m H ... 875) 12 Bom H C 247, Srinivasa v Sheshayangar, (1878) 3 Mad, 37, Husaini Begum v Mulo, (1883) 5 All, 84

[9] Hira Ambaidas v Tekchand, (1889) 13 Bom, 670

[10] Ramkrishna *in re* ... 421 Reference ... Meer Kaisur v ... 10 Bom, 58 and

[11] Jwala Prasad v Ram Narain (1893) 15 All, 107.

A court having once granted a certificate need not give him another to enable him to escape any penalty he may have incurred by reason of insufficient stamping [1]

Limitation — The provisions of the Limitation Act do not apply to an application for a sale certificate [2] and if granted after three years from confirmation of sale by one Judge, his successor cannot interfere with the order [3]

Decree still subsisting — The former Code expressly provided that the decree must be unreversed and in full force on the date of the confirmation,[4] and probably the decisions under this Act will be similar although this provision is absent [5] The purchaser should satisfy himself on this point before he applies for confirmation [6]

Immoveable property —The words ' immoveable property ' have not been defined in the Act , in questions concerning the rights of Hindus they will probably be taken to include whatever the Hindu law classes as immoveables, such a *hak* in Bombay [7] A decree for the sale of mortgaged property was attached and sold *held* the purchaser should get a certificate, as he bought not merely the paper but the interest in the immoveable property recoverable under the decree and that such interest must be regarded as immoveable property within the meaning of this section [8]

Sale of mortgaged property under money-decree —By s 99 of Act IV of 1882, which came into force on the 1st of July, 1882, the mortgagor is prohibited from selling the mortgaged property under a money decree unless by suit under s 67 of the same Act [9]

Silence of creditor fraud —Except in cases falling within Order, XXI, rr 90 91 or where the judgment debtor has no saleable interest [10] and the sale has

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1 Nandram Motiram v Kachabhan (1885) 9 Bom , 526 , id, 472

2 Kylasa Goundan v Ramasami, (1882) 4 Mad , 172 , Vithal Janardan v Vithojirav (1882) 6 Bom 586

3 Vithal Janardan v Vithojirav, (1882) 6 Bom , 586 , Devidas v Pirjada (1884) 8 Bom 377

4 Sec 316 old code See Mahomed v Kokil, (1881) 7 Calc , 91 Ram Sukh v. Ram Sahai (1907) 29 All , 591

5 See Order XXI, r 89

6 Pasupa v Dundaya (1878) 2 Bom , 540 Doyamoyi v Sarat Chunder, (1898) 25 Calc 175 1 Calc W N 656.

7 Fatesangji v Desai Kallianrayaji, (1873) 10 Bom H C , 281

8 Hari Govind v Ramchandra (1871 2) 9 Bom H C , A C J , 64. See notes to s 16, pp 129 130

9 Kaveri v Ananthayya (1887) 10 Mad , 129 , Durgayya v Anantha, (1891) 14 Mad 74

10 Shib Lall v Lochun Singh, (1868) 3 Agra Rev , 7 , Doolhin Hurnath v Baijoo Oojha (1867) 2 Agra 50 , Bank of Hindustan v Premchand, (1867) 5 Bom. H C O C , 83

11 Krishnapa v Panchapa (1869) 6 Bom H C , 258

12 Mahomed Sayal v Navroji (1886) 10 Bom , 214

13 Huronath Roy v Mothooranath, (1867) 7 W R , 4 Dhondu v Ramji, (1867) 4 Bom H C , A C J , 114

14 Douglas v Collector of Benares (1849) 5 Moo I A , 271

15 Chooramun Singh v Mahomed Ali (1881) L. R., 9 I A , 21 See also Basvantapa v Ranu (1871) 9 Bom H C , 86

Mortgage.—Mortgages noted in the proclamation of sale should be entered in the certificate and computed as part of the purchase money, if they have been admitted by the parties or established by decree or declared to be charges on the property and the sale has been held subject to them [1]

... *infra* The present rule is that ... rtificate, the whole execution

To whom granted.—The certificate can be granted to the representative of a deceased purchaser,[3] or to a creditor of the decree holder who attaches the decree after sale [4]

Evidence.—A statement in a sale certificate granted by a Court that the purchase is subject to a charge is not conclusive evidence against the purchaser, when it is sought to enforce the charge by suit [5]

A sale certificate raises a presumption that the purchase money has been paid [6]

Estoppel.—The acceptance of a sale certificate by the purchaser of a mortgagor's interest in land, is not an admission of the mortgagor's title within s 19 of Act XV of 1877 [7]

Registration.—Registration is not compulsory, and a document merely because it is registered cannot take effect against an unregistered sale certificate [8]

Stamp.—An application by an auction purchaser for a certificate of sale need bear no Court fee stamp [9] The purchaser must procure the stamp Claims admitted by the parties should be taken into account in ascertaining the stamp duty, and they should be entered in the certificate [10] Where property subject to an incumbrance is sold by auction in execution of a decree, the sale certificate should be stamped according to the amount of the purchase money together with the incumbrance [11] By s 10 of the Indian Stamp Act the stamp duty is payable not by the deposit of the sum required to purchase stamps, but by the stamps themselves

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[3] Vinayak Narayan, *in re*, (1900) 24 Bom, 120

[4] Beharia *v* Rampertab Mull (1907) 11 C W N 158

[5] Rama Chandra *v* Kassim, (1893) 16 Mad 207 If in a suit the sale is admitted, no certificate is necessary—Doorga Narain *v* Bancy Madhub (1881) 7 Calc 199 p 207, and this is also the practice in Madras—Salagopa *v* Jamuna Bhai, (1882) 5 Mad 54, Velan *v* Kumarasami (1888) 11 Mad 296 and in the North West Provinces—Jagan *v* Lalleo (1883) 5 All, 305 and in Bombay—Naigar *v* Bhaskar, (1886) 10 Bom, 444

[6] Fyazooddeen *v* Shumsunnissa, (1863) 12 W R, 508.

[7] Ambala Vaveri *v* Naduvakat, (1883) 6 Mad, 325

[8] See ss 17 and 50 of the Registration Act as amended by s 65 (1) and (2) of Act VII of 1888 As to the previous law, see 7 Mad, 248 and 419, 6 Bom, 495, 9 Bom, 472, 5 All, 568, 9 Calc, 82 Under s 35 of Act II of 1899, ... l, unless it has been duly stamped— ... C, A C, 136, Harkisan Das *v* Bai ... Ialhari *v* Rakhmai, (1873) 10 Bom H, ... ialudin, (1875) 12 Bom H C, 247, ... Mad, 37, Husaini Begum *v* Mulo, (1883) 5 All, 54

[9] Hira Ambaidas *v* Tekchand, (1889) 13 Bom, 670

[10] Ramkrishna, *in re*, ... 421, Reference, ... Meer Kaisur *v* ... 10 Bom, 58 and ...

[11] Jwala Prasad *v* Ram Narain, (1893) 15 All, 107.

A court having once granted a certificate need not give him another to enable him to escape any penalty he may have incurred by reason of insufficient stamping [1]

Limitation —The provisions of the Limitation Act do not apply to an application for a sale certificate and if granted after three years from confirmation of sale by one Judge, his successor cannot interfere with the order [3]

Decree still subsisting —The former Code expressly provided that the decree must be unreversed and in full force on the date of the confirmation,[4] and probably the decisions under this Act will be similar although this provision is absent [5] The purchaser should satisfy himself on this point before he applies for confirmation [6]

Immoveable property —The words ' immoveable property have not been defined in the Act in questions concerning the rights of Hindus they will probably be taken to include whatever the Hindu law classes as immoveables, such a *hak* in Bombay [7] A decree for the sale of mortgaged property was attached and sold *held* the purchaser should get a certificate, as he bought not merely the paper but the interest in the immoveable property recoverable under the decree and that such interest must be regarded as immoveable property within the meaning of this section [8]

Sale of mortgaged property under money-decree —By s 99 of Act IV of 1882, which came into force on the 1st of July, 1882, the mortgagor is prohibited from selling the mortgaged property under a money decree unless by suit under s 67 of the same Act [9]

Silence of creditor fraud —Except in cases falling within Order, XXI, rr

gage decrees, and purchases in the second he cannot set up his sale against the first purchaser [15] And if the decree holder has a lien on the property, and

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[1] Nardiram Motiram v Kachabhai (1885) 9 Bom , 526 , id 472

[2] Kylasa Goundan v Ramasami, (1882) 4 Mad , 172 , Vithal Janardan v Vithojirav (1882) 6 Bom 586

[3] Vithal Janardan v Vithojirav, (1882) 6 Bom , 586 , Devidas v Pirijada (1884) 8 Bom , 377

[4] Sec 316 old code See Mahomed v Kokil (1881) 7 Calc , 91 Ram Sukh v Ram Sahai (1907) 29 All 91

[5] See Order XXI r 89

[6] Basappa v Dundaya (1878) 2 Bom 540 Doyamoyi v Sarat Chunder, (1898) 25 Calc 175 1 Calc W N 656

[7] Fatesangji v Desai Kallianraiji, (1873) 10 Bom H C , 281

[8] Hari Govind v Ramchandra (1871 2) 9 Bom H C , A C J 64 See notes to s 16, pp 129 130

[9] Kaveri v Ananthayya (1887) 10 Mad 129 Durgayya v Anantha, (1891) 14 Mad 74

[10] Shib Lall v Lochun Singh (1868) 3 Agra Rev , 7 Doolhin Hurnath v Baijoo Oojha (1867) 2 Agra 50 Bank of Hindustan v Premchand, (1867) 5 Bom H C , O C , 83

[11] Krishnapa v Panchapa (1869) 6 Bom H C , 258

[12] Mahomed Siyal v Navroji (1886) 10 Bom , 214

[13] Huronath Roy v Mothooranath, (1867) 7 W R , 4 Dhondu v Ramji, (1867) 4 Bom H C A C J , 114

[14] Douglas v Collector of Benares (1849) 5 Moo I A , 271

[15] Chooramun Singh v Mahomed Ali (1881) L R , 9 I A 21 See also Basvantapa v Ranu (1871) 9 Bom H C , 86

standing by allows it to be sold as unencumbered he loses his lien against the purchaser [1] so also if he lets it be sold without notice,[2] especially if, when asked he does not give full information [3]

Silence of debtor —There is no duty on the judgment debtors to come forward [4] and if sued as representatives then, unless they induce bidders to suppose that they claim no personal interest in the property or mislead them by their silence they can claim their share [5]

Bona fide purchaser for value —Under the former Code, the Bombay High Court appears to have held that an auction purchaser is not a bonafide purchaser for value whereas their lordships of the Privy Council have said that a purchaser under a sale in execution is not bound to inquire into the correctness of the order for execution any more than to look behind the decree to see whether it has been rightly made [8]

No title guaranteed —No title is guaranteed to the purchaser at an execution sale beyond that he shall have the rights and interests in the property which belong to the judgment debtor or in other words that the judgment debtor shall not recover back the lands [9] and that if the judgment debtor, or his heirs, recover the property they cannot hold against him [10] unless they can claim adverse possession for more than twelve years nor can any other person be bound by the decree [11] The intending purchaser is bound to satisfy himself of the value and quality of the property as if he was purchasing from a private person [12] The suit of a first mortgagee was compromised and decree passed At a sale on a second mortgage the mortgagor purchased *Held* he could not keep possession against a purchaser on the first mortgage decree [13] If a mortgagor judgment debtor purchases at a sale in execution of a decree obtained by a mortgagee, and the decree remains unsatisfied, the mortgaged property still remains liable and can be sold again [14]

Sheriff's sales —In the case of Sheriff's sales there is no condition for the allowance of compensation for error or misstatements as to the particulars or description of the property Such a condition applies to sales by the Registrar of the Calcutta High Court [15]

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[1] Doollub Sircar v Kristo Coomar (1869) 12 W R 303 3 B L R A C 407 Bhuggobutty v Shamachurn (1876) 1 Calc 353 Doolee Chund v Oomda (1875) 24 W R 263

[2] Nursing v Roghoobur (1884) 10 Calc 609

[3] McConnell v Mayer (1870) 2 All H C 315 As to evidence of fraud see Gheran v Kunj Behari (1887) 9 All 413 Parwar Das v Muhammad (1887) 9 All 690 As to other cases see RIGHTS AND LIABILITIES *infra*

Vasanji v Lallu (1885) 9 Bom p 288

[4] Gurupadapa v Irapa (1890) 14 Bom 558

[5] Bikaji v Sishvantrav (1884) 8 Bom, 489, Teshvart v Govind (1886) 10 Bom 453

[7] Rewa Mahton v Ram Kishen Singh (1886) L R 13 I A 106 As to a *bona fide* purchaser within the meaning of the Limitation Act, see Sesu v Bal krishna (1891) 15 Bom 583

[8] Kaunsilla v Chandra Sen (1900) 22 All 377

[9] Sowdamini Chowdhrain v Krishna Kishor, (1869) 4 B L R F B 11

[10] Deoniraim Singh v Tokhun Singh (1866) 5 W R, 30

[11] Umesh Chunder v Zahur (1891) 18 Calc 164 p 178 (1889) L R, 17 I A 201

[12] Jummal Ali v Tirthee Lall (1869) 12 W R 41 Mahomed Bismilla v Abdulla (1869) 4 B L R, App 35 See Sundara v Venkatavarada (1894) 17 Mad 228

Lutf Ali v Futteh Bahadur (1890) 17 Calc 23 (1888) L R, 16 I A 129

Raghunath Sahay v Lalji Singh (1896) 23 Calc, 403

[15] Ram Narain v Dwarkanath (1899) 4 Calc W N, 13 (1900) 27 Calc, 264 See REGISTRAR'S SALE, under O XXI r 90

What passes —Nothing passes except the right and interest of the judgment debtor at the time of the sale [1] If the judgment debtor has any interest in the property the purchaser gets it not as it stood at the moment of sale, but as attached and notified for sale And where there was no specific attachment owing to the property being submerged by the river but the property was sold as that of the judgment debtors, it was held that their rights in the property were sold ,[3] and the purchaser ordinarily takes subject to the prior right contingent on confirmation of a former purchase though such former purchase be confirmed subsequently to his own [4] A purchaser under a mortgage sale is entitled to possession as against a purchaser under a decree for money with notice of the mortgage lien [5] Where there is a difference between the notification of sale and the sale certificate the conditions of the notification are taken as of superior authority [6] but another contention is that where there is any difference between the order of sale and the certificate the latter will prevail unless the purchaser has notice of the difference The right of the purchaser is confined to the right, title and interest of the debtor which were seized and sold with all its defects [8]

At a sale of an impartible zamindari when what is sold according to the sale certificate is the right title and interest of the judgment debtor the purchaser takes an interest for the life only of the judgment debtor [9]

Where an execution sale was held in execution of three decrees two of them against one brother alone and the third against three brothers jointly and separate attachments and separate sale proclamations were made in all these cases, *held* that the sale operated a transfer of all three brothers' interest in the [illegible]

Mortgage and Money Decrees —By a sale of mortgaged property in execution of a decree obtained by a mortgagee against the mortgagor upon the mortgage, the interest of both the mortgagor and the mortgagee passes to the purchaser But, by a sale of mortgaged property in execution of a money decree

[1] Akhe Ram [illegible]
(1876) 1 A[illegible]
Kurrun [illegible]
Bom H[illegible]

[2] Ram Onoogroh v Montoriun (1866) 6 W R , 223

[3] Mohammad Abdul Kadir v Kutab Husain (188) 9 All , 136

[4] Konapa v Janardan (1874) 11 Bom H C 193

[5] Sheoratan v Chotey Lall (1880) 3 All , 647

[6] Uma Churn v Gobind Chunder (1877) 1 C L R 460

[7] Gowree Kumul v Surut Chunder, (1874) 22 W R., 408.

[8] Dorab Ally v Abdool Azeez (1877) L R 5 I A , 125 Deendyal v Jugdeep [illegible] 274 , Assamathem v Roy [illegible] Executors of Mehecond [illegible] eswar Lal Sahoo (1874) (1875) 23 W R 305 , Umamaheswara v Singa [illegible] amount of share—Ranga [illegible] ipare—Madho Pershad v (1891) 18 Calc , 157 and [illegible] yet if only the right title [illegible] urchaser of this no more— [illegible] 61 , L R 6 I A 47

[9] Abdul Aziz v Appayasami, (1899) 22 Mad , 110

[10] Tara Lal Singh v Sarobur Singh (1899 1900) L R , 27 I A 33 See also Balvant v Hira Chand, (1903) 27 Bom , 334

[11] Tikai Sherab v Dayal Mullick, (1867) 4 W R P C , 87 , (1849 57) 6 Moo. I A , 510

obtained by the mortgagee against the mortgagor the interest of the mortgagor alone passes to the purchaser [1]

Increment – Under the former Code it was held that if between the time of attachment and time of sale, the interest of the judgment-debtor is accelerated or enlarged, the increment passes and the reasoning in that case seems to hold good under this section [2]

Effect of vesting order in insolvency proceedings.—A judgment-debtor was declared an insolvent by the Court for the relief of insolvent debtors, Madras, and a vesting order was made Part of his property was subsequently attached in execution of a decree Afterwards his petition in insolvency was dismissed and the vesting order discharged On the same date a creditor's trust-deed was executed, of which the plaintiffs were trustees They now sued to set aside the execution proceedings and to cancel the sale of the property sold in execution after the date of the trust deed *Held*, that the suit was not maintainable [3]

Rights and liabilities —See "LIS PENDENS, Order XXI, r. 35

The purchaser is entitled to possession from the date of confirmation of sale,[4] but he cannot seek to recover what the debtor could not [5] He buys subject to all liens, mortgages, and leases existing[6] and equities affecting the judgment debtor,[7] but not to a custom binding on private purchasers only,[8] nor to a notice of foreclosure issued after his purchase on his predecessor[9] and in a sale held by the Registrar of the High Court, he is entitled to a conveyance, and until he obtains it, the property does not pass to him so as to give him rights as against parties not bound by the decree under which the sale took place [10] Nor is he a party or the representative of a party under s 47 so as to be bound by proceedings under Order XXI, rr 58 64,[11] nor bound by his estoppel [12] He is liable for rent[14] and revenue[14] but if he has notice of a charge, and does not pay it, he will be held liable for all the costs incurred in enforcing the security [15] He is entitled to the crops unless there is a custom to

[1] Magan Lal v Shakra Girdhar (1898) 22 Bom , 945 See also Sheshgiri Shanbhog v Salvador Vas, (1881) 5 Bom , 5 , Khevraj Jasrup v Lingaya, (1881) 5 Bom 2

[2] Umesh Chunder v Zahur, (1891) 18 Calc , 164 , (1889 90) L R , 17 I. A , 201.

[3] Ramasami v Murugesa, (1897) 20 Mad , 452

[4] Mohima Chunder v Nobin Chunder, (1896) 23 Calc , 51

[5] Zalim v Choonee Lall (1869) 4 Agra, 194 , see also Lala Ram Surun v Lokebas Kooer, (1872) 18 W R , 39 , he can add his possession to that of the debtor for the purpose of pleading limitation—Ali Saheb v Kaji, (1892) 16 Bom , 197

[6] O[illegible] v Satyabha[illegible] 6 Bom , 193 ; Kishan Lal v. [illegible]1) 3 All 647

[7] Ram Lochun v Ramnarain, (1878) 1 C L R , 296

[8] Kalian v Bhagnathi, (1884) 6 All , 47

[9] Mohun Lal v Goluck Chunder, (1863 6) 10 Moo I A 1 ; Rameswai v Mewai, (1885) 11 Calc , 341

[10] Johur Mull v Taran Kisto, (1884) 10 Calc , 252

[11] Vishvanath v. Subraya, (1891) 15 Bom , 290

[12] Parbhu Lal v Mylne, (1887) 14 Calc 401 , Bashi Chunder v Inayat Ali, (1893) 20 Calc , 236

[13] Obhoy Chunder v. Nilambur Mookerjee, W R , (1864) 72 , Khoda Buksh v Degumburee, W. R (1864) p 207

[14] Chatraput v Grindra Chunder, (1881) 6 Calc , 389 ; see, however, Prem Chand v Purnima, (1888) 15 Calc , 546

[15] Land Mortgage Bank v Ram Ruttun, (1874) 21 W. R , 270

the contrary,[1] to the trees severed,[2] to buildings, unless excluded [3] and to a right of easement against the debtor, as if he had voluntarily sold [4] The purchaser at a sale in execution of a money decree takes subject to a previous mortgage The doctrine of *lis pendens* applies to a purchaser at a sale in execution of a money decree after the mortgagee had obtained a decree declaring his lien on the property [5] The rule of *lis pendens* applies to purchasers at execution sales [6]

Estoppel —If a person sells property covered by a mortgage and, suppressing the fact, obtains, the full value of the property as unencumbered, he cannot afterwards say that the purchaser took it subject to the lien[7] so where in execution of a money decree the decree holder sold certain property which had been mortgaged to him by a registered bond, without notice of the existing lien, and afterwards obtained a decree on the mortgage bond which he transferred to a third party *held*, that neither the mortgagee, nor his transferee could follow the property previously sold [8] An auction purchaser is not estopped from setting up a title independent of that based on his purchase [9] and he differs in many important points from that of a private purchaser [10] It has been held that without notice he is not bound by an agreement to mortgage made by the judgment debtor [11] nor generally for any mere personal objections against the debtor, such as an estoppel, unless he is a mortgagee purchasing under his own decree [12]

Alienation by debtor —He is entitled to question the fraudulent acts and alienations of the judgment debtor in fraud of the decree [13] and in some cases in the North West, has been elevated to a position very analogous to that of a creditor ,[14] but the distinction is well marked in Bengal [15] He can claim a partition if the debtor was a member of an undivided family governed by Mitak

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[1] Afatoolla Sirdar v Dwarka Nath (1879) 4 Calc 814 (1890) 4 C L R 95 Land Mortgage Bank v Vishnu (1878) 2 Bom 670 Ramalinga v Samiappa, (1879 13 Mad 15

[2] Faqueer Soonar v Khaderun (1870) 2 All H C 251 but see Chitoor Bhoy v Villaet Ali W R (1864) p, 223 Abdool v Dataram, W R, (1864) p 367

[3] Abu Hasan v Ramjan Ali (1882) 4 All 381

[4] Hureo Madhub v Hem Chunder (1874) 22 W R 522

[5] Shyama Churn v, Ananda Chandra, (1898 9) 3 Calc W N 323

[6] Byramji v Chuni Lal (1903) 27 Bom 266

[7] D [illegible] see also Salamat Abdulla, (1881) 5 [illegible] As to the estoppel of his mortgage [illegible] m, 2, Sheshgiri Shanbhog v Salvador Vas (1881) 5 Bom, 5 and Magan Lal v Shakra Girdhar (1895) 22 Bom, 945

[8] Doollub Sircar v Kristo Coomar, (1869) 12 W R, 303, 3 B L R, 407

[9] Pandit Hanuman Dat v Mufti Assadullah (1875) 7 All, H C 145

[10] Dinendronath v Ram Ko[illegible]r (1880 1) L R 8 I A, 65 (1881) 7 Calc, 107, Alukmonee Dabee v Binoo Madhub, (1870) 4 Calc, 677, Kali Das v, Kanhya (1883 4) L. R, 11 I A, p 229

[11] Bhuggobutty v Shamachurn, (1876) 1 Calc, 337

[12] Purlha Lal v Mylne, (1887) 14 Calc, 401, Poreshnath Mukerjee v Anathnath (1883) 9 Calc, 265 Kishory Mohun v Mahomed, (1891) 18 Calc., 188; Basti Chunder v Enayet Ali, (1893) 20 Calc, 236

[13] Baicho v Howard (1868) 3 Agra 15, Dewan Roy v Riddell, (1868) 9 W. R, 221, but see Burjorji v Dhunbai, (1892) 16 Bom, 1

[14] Oomrao Singh v Shumboo Nath (1870) 2 All H C, 38, Alfatun v Rao Karan Singh, (1875) 7 All H C, 302

[15] Ram Surun v Lokebas Kooer, (1872) 18 W R, 39

share law [1] but he cannot claim the benefit of the law that an unregistered mortgage without possession is not valid against a subsequent purchaser in possession. An auction purchaser can bring a suit after the date of confirmation of sale for damages against the defendant for cutting trees [2]

Priority —As between purchasers who purchased the same property on the same day in execution of two mortgage decrees, the purchaser in the earlier mortgage will have preference [4] A purchaser at a sale under mortgage for payment of Government revenue is to be preferred to a purchaser at a sale under mortgage for payment of the debts of the judgment debtor, [5] and a purchaser under a money decree is preferred to a purchaser under a colourable mortgage decree [6]

Hindu widow —As to the right of a Hindu widow to reside in the family dwelling house against a purchaser see *Ramanandan v Rangammal* [7] And as to when an auction purchaser at a sale in execution of a mortgage decree will take a property free of plaintiff's right of residence as a Hindu widow, notwithstanding notice of her claim [8]

Purchaser under mortgage sale —In such cases, the purchaser obtains the right title and interest which the mortgagor had at the time of executing the mortgage free from all subsequent incumbrancees, [9] but subject to incumbrances existing at the time of sale [10] which in the case of a mortgage he has a right to redeem [11] and a subsequent incumbrancer not a party must give up possession, though with power to redeem within six months [12] A purchaser at a sale under a decree recovered by a mortgagee is not bound by leases made by the mortgagor unless he has recognised the lessees as his tenants [13] If the purchaser is the mortgagor judgment debtor, and the decree obtained by the mortgagee remains unsatisfied the mortgaged property remains liable and can be sold again at the instance of the mortgagee [14]

Purchaser under Hindu law —The general rule is that the right, title, and interest of the judgment debtor may either mean the share he should obtain on partition or the amount which he might have sold to satisfy the debt, and in each case it is a mixed question of law and fact to determine what the Court intended to sell, and what the purchaser expected to buy, [15] and in deciding it the execu

[1] Deendyal v Jugdeep Narain (1878) 3 Calc 198, (1877) L R, 4 I A, 247

[2] Ganpat Bajashet v Khanlu Chaugshet (1867) 4 Bom H C, 69 Mathuradas Ranchoddas v Kalia Khushal (1870) 7 Bom H C, A C J 24

[3] Adhur Chunder Banerjee v Aghore Nath Aroo (1898) 2 Calc W N 589

[4] Janki Das v Badri Nath (1880) 2 All, 698,

[5] Kasumunnissa v Nilratna, (1882) 8 Calc, 79

[6] Gopi Wasudev v Markande (1879) 3 Bom 30

[7] *Ramanandan v Rangammal (1889) 12 Mad, 260*

[8] Manilal v Tara, (1893) 17 Bom, 398

[9] [illegible] Trimbak v Narayan (1884) 8 Bom, [illegible] d, 73 p 86, Ponnappa Pillai v [illegible], see also Raj Narain v Sheeram [illegible] hotty Lal (1880 1) 3 All, 647, 10 W R, 151, 1 B L R, A C, 152

[10] Kasandas Laldas v Pranjivan, (1870) 7 Bom H C, A C, 146

[11] Joogul Kishor v Bhukha Chowdhery, (1868) 9 W R, 244

[12] Mohan v Togu, (1886) 10 Bom, 224

[13] Koomeroonissa v Hunooman Doss, (1862) Marsh, 122, but see Baneo Pershad v Reet Bhunjun, (1868) 10 W R, 325

[14] Raghunath Sahay v Lalji Singh, (1896) 23 Calc, 397

[15] Appaji v Keshav, (1891) 15 Bom 13 Gnanammal v Muthusami (1890) 13 Mad, 47, Pettachi v Sangili, (1887) 10 Mad, 241, L R, 14 I A, 84

tion proceedings are the best evidence,[1] and if the question is doubtful on the face of the proceedings the Court must look to the substance of the matter and not to the form or language of the proceedings The purchaser only gets what he has reason to think he is buying, and the purchase of a whole family estate is not supported by a certificate purporting to convey only the right and interest of the father [3] but where in proceedings against a Hindu his son objected that his interest should be excluded and failed held the whole estate was sold [4] The purchaser of an undivided interest not under a mortgage decree against the father [5] and against him only,[6] during the life time of the debtor obtains the debtor's interest [7] and can now sue for a partition throughout India [8] and in Bengal he can also claim to hold jointly with the members [9] Where a debt is incurred by a Hindu as manager of the family for family purposes the other members of the family, though not parties to the suit will be bound by the decree passed against him in respect of the debt and if in execution of the decree any joint property is sold, the interest in the whole of such property will pass by the sale [10]

Father's debts—At a sale under a decree against the sons for the debts of their father, according to the Mitakshara law, the purchaser sometimes gets the father's estate, [11] for the right and interest of the sons in the zemindary is assets in their hands liable for the father's debts, [12] but not because they are members of the joint family [13] and even if the decree has been passed in the father's life time, yet if the purchaser gets the entire estate in possession, or it is not shown he has not, [14] they cannot recover the property, unless they show

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1 Mahabir Pershad v Markunda Nath (1889 90) I R, 17 I A, 11 p 16, 17 Calc 584 p 589, Natesayyan v Narasimmayyar, (1890) 13 Mad 480, p 483

2 Jeolal Singh v Gunga Pershad (1884) 10 Calc 996, see also Nitayi Behari v Hari Govinda, (1899) 26 Calc, 677, Ananda Kumar v Hari Dass, (1900) 27 Calc, 545

3 [illegible] 14 I A, 77, 14 Calc, 572, Ram Basa Mal v Maharaj Singh, (1886) 86) 9 Mad, 188, Pettachi v Sangili,

4 [illegible]

5 [illegible]

Calc, 626

6 Kisansing v Moreshwar (1883) 7 Bom, 91, Chockalinga v Subbaraya, (1881) 5 Mad, 132, but see L R, 4 I A, 254 4 Mad, 181

7 Hurdey Narain v Pooder Perkash, L R, 11 I A, p 29 10 Calc, 626

8 Deendyal Lall v Jugdeep Narain (1878) 3 Calc, 198 L R 4 I A, 247, Dorasami v Atiratra (1883) 7 Mad, 136 Jumoona v Dig Narain, (1884) 10 Calc, 1 (1883) 13 C L R, 74, see also Collector of Monghyr v Hurdai Narain, (1880) 5 Calc, 425

9 Bijoi Kesab v Samasundari (1863 7) B L R, (F B) 172 Eshan Chunder v Nund Coomar, (1867) 8 W R, 239

10 Sakharam v Devji, (1899) 23 Bom, 372

11 Girdharee Lall v Kantoo Lall (1874) 22 W R, 56 L R 1 I A, 321, Sham Sunder Koer v Jumna (1876) 25 W R, 148 Pundit Hari Ram v Mulu, (1875) 7 All H C 110, Meenakshi v Immudi (1888 9) L R, 16 I A 1, (1881) 12 Mad, 142, Daji Himat v Dhiraj Ram, (1888) 12 Bom, 18

12 Muttayan v Sangili, (1883) 6 Mad 1 (1881 2) L R, 9 I A, 128 Bhagbut Pershad v Girja Koer (1887 8) L R, 15 I A 99, p 101, (1888) 15 Calc, 717

13 Muttusami v Rama Krishna, (1889) 12 Mad, 293

14 Srinivasa v Yelaya (1882) 5 Mad 251, Subbayyan v Ruppa, (1883) 6 Mad, 155, Prem Singh v Partab (1892) 14 All, 173; Narayanrav v Javherrabu, (1888) 12 Bom, 431.

that the debts in question,[1] were contracted for immoral purposes and that the purchaser had notice that they were so contracted, and if the purchasers are strangers to the suit and have not had notice that the debts were so contracted, they are not bound to make enquiry beyond what appears on the facts of the proceedings [2] But whether the son's interest does or does not pass will have to be determined by the circumstances of each case [3] and in *Bhagwat Dass* v *Gouri Kunwar* [4] the sons were allowed to take possession of their share against the purchaser of the right title and interest of the father In a later case where the debt was tainted with illegality or immorality it was held that the son's interests did not pass at the sale further that the purchasers were not entitled to the equities of a *bona fide* purchaser as the decree if examined, would have put them on enquiry [5] Ordinarily unless the property has been attached and ordered to be sold, a right to a share in joint ancestral property dies with the sharer, and his previous share is no longer subject to execution in a mere money decree, even though he may have died after the decree [6]

Representative capacity —In other cases it is only where it is manifest that the father of a joint family has mortgaged the family property for a debt, and a decree has been obtained for realization of the debt by means of a sale of the mortgaged property [7] or that the judgment debtor has been sued in a representative capacity [8] that the Court will allow a sale in terms of the interests of the judgment debtor to convey the interests of others [9] Thus the purchaser gets the estate under a decree against the widow for the debt of her husband [10] if this fact appears in the plaint [11] or in the judgment [12] or the decree is for rent due in his life time, and she is sued as guardian of her minor son, [13] or the

[1] Chintamunrav v Kashinath (1890) 14 Bom 320
Meenakshi v Immudi (1888 9) I R 16 I A 1 p [illegible] Bhagbut Pershad v Girja Koer (1887 8) L R 15 I [illegible] I R 6 I A 88 Velliyammal v [illegible] v Mohan Mohun (1885 6) I [illegible] Mad, 64 see also Bom Madl [illegible] Rahman v Gobind Pershad (189[illegible] Chand (1896) 23 Calc 262

[2] Baso Koer v Hurry Dass (1883) 9 Calc 49[illegible] see also Kagal Ganpaya v Manjappa (1888) 12 Bom [illegible]

[4] Bhagwat Das v Gouri Kunwar (1880) 7 C L R 218

[5] Paremai v Bhattu Mahton (1897) 24 Calc, 672

[6] Suraj Bunsi [illegible] Sheo Prashad (1878 9) I R 6 I A, 88 Luchmee Dut v Asman Singh (1870) 2[illegible] W R 421

[7] Pemraj v Savalya (1891) 1[illegible] Bom 293 Bhagbut Pershad v Girja Koer (1887 8) L R 15 I A, 99 Hurdey Narain v Rooder Perkash (1883 4) L R 11 I A 26 Maruti v Babaji (1891) 15 Bom, 87, Bhikaji v Yashvantrav, (1884) 8 Bom 489 Ponnappa v Pappuvayyangar, (1886) 9 Mad, 343, Trimbak v Narayan (1884) 8 Bom 481

[8] Sathuvayyan v Muthusami (1889) 12 Mad 325 Hari Vithal v Jairam (1890) 14 Bom 597 Sheo Pershad v Saheb Lal (1893) 20 Calc 453

[9] Lohi Mahton v Ajub Lal (1879) 4 C [illegible]
(1877) L R 4 I A 247 3 Calc
3 C L R 561 L R 6 I A, 4
Dos ee (1866 7) 11 Moo I A, 241
I, 13 C L R 74 Phulchand v

[10] [illegible] 285, see also Baroda [illegible] has an adopted (1885) 11 Calc, 45,—408

[11] Mahabir Prasad v Basdeo Singh, (1884) 6 All p 234

[12] Jugol Kishore v Jotindro Mohun (1883 4) L R 11 I A, 66 or in the decree Alukmonee Dabee v Banee Madhub (1870) 4 Calc 677

[13] Manager of Raj Durbhangha v Ramaput Singh, (1872) 10 B L R, 204, (1872) 17 W R 459

decree is for costs in a suit in which she seeks to recover family property,[1] and where the property is sold in satisfaction of several claims against her, some of which bind the estate, though she has a power to adopt and afterwards exercises it, the purchaser gets the full estate,[2] but, in other cases as one member of a joint family is not bound to pay the debts of another, unless he is his father, a sale under a decree against one for his debt, whatever be its nature, merely passes his property[3] A *karnavan* does not represent persons who have ceased to be members of the *tarwad* and a Court sale does not bind them, if they have not been made parties to the execution proceedings,[4] and if in execution of a money decree obtained against a person who happens to be the *karnavan*, the *tarwad* property is sold, the purchaser gets nothing[5] A Hindu judgment debtor died leaving a widow and two sons who were minors His widow was placed or the record as his heir and not his sons Certain property of the deceased was sold in execution The sale certificate issued to the purchaser stated that he had purchased the right, title, and interest of the judgment debtor in the property In a suit subsequently brought by the sons, it was held that they were bound by the sale The widow of the deceased judgment debtor, who, as natural guardian of the minor sons, was in possession of the property, was upon the record, and it was the interest of the judgment detbor and not that of the widow that was intended to be sold[6]

Widow representative —If the decree is for debts incurred in her life, a purchaser under a money decree only gets her life interest[7] If the decree declares a charge on the estate, and it is justified by legal necessity[8] the purchaser gets the estate, unless the widow does not properly defend the suit,[9] or being only possessed of a limited interest in the estate, such as maintenance, she could not possibly represent it[10] If a Hindu widow acting as manager of the family sells property to pay off family debts, the sale is binding on her minor sons[11]

Mahomedan Law —Where a widow died leaving a son and a daughter and was sued "as represented by her minor son represented by his guardian" for debt, and at the sale the widow's interest was sold *held*, it passed the interest of the daughter and she could not recover her share, unless she could show that the debt was not due[12]

A Mahomedan office to which are attached substantially the conduct of religious worship and the performance of religious duties, is not legally saleable, any custom to the contrary notwithstanding[13]

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[1] Ramkishore v Kallykanto, (1881) 6 Calc, 479

[2] Debendro Narain v Chundornath Roy, (1873) 20 W R, 30

[3] Dorasami v Atiratra (1884) 7 Mad, 136, Abilak Roy v. Rubbi Roy, (1885) 11 Calc, 293 Hari Premji v Hakamchand (1886) 10 Bom, 363; Lakshman v Kashinath, (1887) 11 Bom, 700, see also Armugam v Sabapathi, (1882) 5 Mad, 12, Subramaniyayyan v Subramaniyayyan, (1882) 5 Mad, 125, Sandur Lal v Yakub Ali, (1884) 6 All, 362

[4] [illegible]

[5] [illegible]

[6] [illegible] e Janki Bai v Mahadeb, [illegible]

[7] Bajun Doobey v Brij Bhookun Lall, (1874 5) L R, 2 I A, 275, (1875) 24 W R, 308, Ramasami v Sellettammal, (1882) 4 Mad, 375

[8] Bistobehari Sahoy v Bajnath Prasad (1871) 7 B L R, 213

[9] Brammoyee Dassee v Kristo Mohun, (1877) 2 Calc, 222.

[10] Ramasami Chetti v Saluckai, (1874 5) 8 Mad H C, 183, and see Bai Jamna v Bhaishankar, (1892) 16 Bom, 233 But see the cases against this view, referred to in "Legal Representative" under sec 72

[11] Succaram Morarji v, Kalidas Kalianji, (1894) 18 Bom, 631.

[12] Khurshet Bibi v Keso (1888) 12 Bom, 101, Nuzeerun v Ameeroollleen, (187) 24 W R, 3 and compare Assamathem v Lu chmeeput, (1879) 4 Cal, 142 See also the note under sec. 72

[13] Sarkum Abu v Rahaman Buksh, (1897) 24 Calc, 83

Registrar's sale.—In *Kishory Mohun Roy v. Kali Churn Ghose*,[1] compensation for a deficiency in the quantity of land sold was allowed out of the purchase money of property sold at a High Court Registrar's sale, although the purchaser had obtained an order for the confirmation of the sale.

Land Revenue sale.—The general rule that a Government sale for arrears of revenue gives a title against all the world is subject to the exception that if it is caused by the default of a mortgagee, it does not take away the mortgagor's right to redeem the mortgage to recover the land.[2]

Second appeal.—A second appeal lies to the High Court against an order passed by a Judge refusing to confirm a sale on the ground that there was no subsisting decree at the date when the confirmation of sale was applied for, and the question raised being one coming under s. 47.[3]

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

66. (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

Act XIV of 1882, s. 317. This section applies to H. C.

Suit against purchaser.—The provisions of s. 317 of Act XIV of 1882, are subject to no limitation other than such as is contained in the section itself, *viz.*, that the suit, the maintenance of which is prohibited by that section should be (1) brought against a certified purchaser and (2) based upon the ground that [illegible] the certified purchaser [illegible] A person taking an a[illegible] not entitled under s. 317 [illegible] recover the land purchased on the ground that the purchase was made *benami*.[5] A suit is not taken out of the section by reason of the beneficial purchaser being in possession and claiming only a declaration of title.[6]

Certified purchaser.—The representative of a purchaser is included.[7] The purchase must be certified by the Court, and presumably it must be, at a sale held under the Code.[8]

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[1] Kishorymohon Rai v. Kalichurn Ghose, (1896) 1 Calc. W. N., 106. But see Administrator General v. Aghore Nath, (1902) 29 Calc., 420, (1900) 4 Calc. W. N., 504.

[2] Kalappa v. Shivaya, (1896) 20 Bom., 492.

[3] Doya Moyi v. Sarat Chunder, (1898) 25 Calc., 175, (1897) 1 Calc. W. N., 656.

[4] [illegible] ohanian,

[5] [illegible]

[6] [illegible] an Das,

[7] [illegible]

[8] [illegible]

The words of the section indicate that the purchase must have been actually certified, but in an old case,[1] it was decided that the party to whom the Court has directed a certificate to be granted is entitled to be regarded as the certified purchaser And where a purchaser who had not obtained a certificate was sued, and afterwards applied for and obtained a certificate he was held to be a certified purchaser under the corresponding section of Act XIV of 1882 [2] A certificate may issue after more than three years from the confirmation of purchase,[3] and it should not be rejected if tendered during the hearing of a suit on this account [4] This section is no bar to a suit against any person claiming through or under the certified purchaser, such as his heir or mortgagee [5]

Object of the section —The section ought to be construed strictly and literally,[6] it refers only to suits between the *benamidar* and the beneficial owner[7] and where the beneficial owner sues the certified benamidar for possession[8] It does not apply to suits brought by the certified purchaser against a party in possession and if the certified purchaser is a *benamidar*, or an agent, and the real purchaser obtains possession of the property honestly, the former cannot dispossess the latter[9] Also where the plaintiff is a purchaser at a sale for arrears of revenue, the defendant is not debarred from raising the plea that the purchase was made *benami* for him[10] At a sale in execution of a decree, the plaintiff purchased certain property in the name of the defendant and continued in undisturbed possession for eight years He then sued the defendant for a declaration of his right and for an injunction restraining him from interfering with it *Held*, that the suit was maintainable[11] Where one joint decree holder has purchased, this section will not bar a suit by the other for a declaration that the purchase was joint[12]

This section was designed to prevent disputes between the purchaser at an execution sale and a person claiming that the certified purchaser had purchased *benami* for him Even though the claimant has had previous possession[13] But where the certified purchaser admits that he purchased for another, there is no reason why that person should not set up his title upon the purchase against a person not the certified purchaser, or claiming through him[14] In a suit to recover possession of property purchased by plaintiff's *benamidar* brought

[1] Banda Ali v Ameerun, (1876) 25 W. R , 493

[2] Aldwell v Ilahi Bakhsh, (1883) 5 All , 478

[3] Kylasa v Ramasami (1882) 4 Mad 172, Vithal Janardan v Vithojirav, (1882) 6 Bom , 586 Lakshman, (1885) 9 Bom , 472.

[4] Devidas v Pirjada (1884) 8 Bom , 377.

[5] Dukhada Sundari v Srimonto Jordar (1899) 26 Calc , 930, 3 Calc W N , 617 See also Raj Chunder v Dina Nath, (1898) 2 Calc W. N , 435, Nokor Dhur v Sarup Chunder Dey, (1901) 5 Calc W N , 341

[6] Raj Chunder v Dina Nath, (1898) 2 Calc W N , 433 p 447

[7] Sheetanath Ghose v Madhub (1864) 1 W R , 329

[8] Khyrat Ali v Syfoollah (1867) 8 W R , 130

[9] Bi

[10] Subbarayar v Asirvatha (1897) 20 Mad 494, Brijo Beharee v Wajed Hossein (1870) 14 W R , 372 Tirumalayappa v Swami Naikar, (1895) 18 Mad , 469.

[11] Sasti Churn Nundi v Annopurna, (1896) 23 Calc , 699

[12] Achhaibar v Tapasi, (1907) 29 All , 557

[13] Bykunt Chunder v Khema Moyee, (1868) 9 W R , 360

[14] Shorosutty Dassee v Gopeesoondery, (1863) Marsh , 423

Registrar's sale—In *Kist ... Mohini ... Kal ... Chr... Ghose*[1] comp n nt n f r n lef en y n the j n ts f lan l s ll as all e l out of the p r hase n ney f ... er y s ll at a H gh C t Reg st ar's sale although the pu l ase l lol ne l an ler f r the co fr t of the sale

Land Revenue sale—The general r le that a Go ernment sale for arrears of reven e ... e at le a nst all the orl l s lject to the except on that if it s ... does not take a ay the mortgagee s right ... r ... ge to re ... er the land

Second appeal ... e on l ap eal l es t the H gh Court aga nst an o ler pass l l y J ... ge of ... n ... t c fr a sale n the gr nd th t there was no sul ... e ee t the l e ... hen the conf mat n of sale as appl ed for and ... unler s 47 ...

66 (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims

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Act XIV of 1882 s 317 This section applies to H C

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under s 317 (old Code) to object to the maintainability of a suit to recover the land purchased on the ground that the purchase was made *benami*[8] A suit s not taken out of the section by reason of he benefic al pu cl aser be ng n possess on and cla m ng o ly a declarat on of ... tle[6]

Certified purchaser—The rep esentat e of a purchaser s ncluded[7] The p rchase mu t be cer fie l by the Court and p esun ably it must be at a sale held un ler the Code[8]

1 Kishoryn ohon Ra ... Kal el u ... Close (1896) 1 Calc W N 106 But see Adm n trator (e e al v Aghore Nath (19) 29 Calc 4 0 (1900) 4 C lc W N 504
2
3 ... W N 6 6
... Mohan ... an
5
6
... an Das
8

against the *benamidar* (who admitted the claim) and the person in possession, it was held the suit was not barred under this section [1] And so the suit would lie, if the benamidar d d [illegible] [2] Defendant acted *benami* in buying certa[illegible] paid part of the pur chase money for plaintiff [illegible] possession on the [illegible]on repayment of the [illegible] who sued to recover [illegible]not affect the rights of members of a joint Hindu family who by operation of law and not by virtue of any private agreement or understanding are entitled to treat as part of their common property an acquisition however made by a member of the family in his sole name if made by the use of the family funds [4]

Suits by third persons —The newly added lines in sub section (2) render clear the right of third persons to maintain suits for publishing their claims against the real owner of the property sold and to assert that the certified purchaser is not the beneficial owner of the property [5]

Power for Local Government to make rules as to sales of land in execution of decrees for payment of money

67 The Local Government, with the previous sanction of the Governor General in Council, may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money where such interests are so uncertain or undetermined as in the opinion of the Local Government, to make it impossible to fix their value

Act XIV of 1882 Sect 327

Rules —For rules made under Act XIV of 1882 See *Calcutta Gazette* July 10th, 1878 Part I p 736 Jany 7th 1880 Part I p 3 *Punjab Notification* No 3859, dated Oct 3rd 1877 As regards Coorg see *Mysore Gazette*, June, 14th, 1879, Part I p 200

Payment of money —See notes to section 34 *ante*

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY

Power to prescribe rules for transferring to Collector execution of certain decrees

68 The Local Government may, with the previous sanction of the Governor General in Council, declare, by notification in the local official Gazette, that in any local

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[1] Arjun Mullick v Farutulla, (1881) 9 C L R, 295

[2] Ramakrishnappa v Adinarayana (1885) 8 Mad, 511

[3] Monappa v Surappa, (1888) 11 Mad 234

[4] Bodh Singh v Ganes Chunder, (1873) 19 W R 306

[5] [illegible] and cases [illegible] Act XIV of [illegible] that [illegible] v Bh[illegible] (1899) 21 All 196 Dukhoda Sundari v Srimonto Joardar (1899) 26 Calc 950 3 Calc W N, 607

against the *benamidar* (who admitted the claim) and the person in possession, it was held the suit was not barred under this section[1] And so the suit would lie, if the benamidar did [illegible] [2] Defendant acted *benami* in buying certain [illegible] paid part of the purchase money for plaintiff [illegible] possession on the understanding that defendant was to transfer the property on repayment of the balance of the purchase money Defendant ejected plaintiff who sued to recover the land The suit was held to be maintainable[3] It does not affect the rights of members of a joint Hindu family who by operation of law and not by virtue of any private agreement or understanding are entitled to treat as part of their common property an acquisition however made by a member of the family in his sole name if made by the use of the family funds[4]

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[4] Bodh Singh v Ganes Chunder, (1873) 19 W R, 306.

[5] See Uncovenanted Service Bank v Abdul Bari, (1896) 18 All, 461 and cases collected in O Kinealy s C P C 6th Ed pp 583 584 So under Act XIV of

550, 3 Calc W N, 657

was not ancestral and therefore could not legally be sold by the Collector[1] When a Collector to whom a decree has been transferred for execution under this section received the decretal amount from a judgment debtor and set aside a sale, which he had no authority to do it was held that a suit would lie to set aside his order and for a confirmation of the sale[2] Similarly a suit to have the Collector's order setting aside the sale cancelled and the sale confirmed is maintainable[3] In execution of a decree for the sale of ancestral property was transferred to the Collector The judgment debtor then privately sold the property the purchasers paid the price to the decree holder and the payment was certified to the Civil Court The Collector being in ignorance of these proceedings sold the property *Held*, that the remedy of the first purchasers was by application in execution and not by suit and that application lay to the Civil Court[4]

Rules—For notifications prescribing such rules in *Bombay* see Bombay List of Local Rules and Orders ed 1896 Vol I pp 378 406 *Burmah*, see Burmah Rules Manual ed 1897 pp 110 111 *North Western Provinces and Oudh* see North Western Provinces and Oudh List of Local Rules and Orders ed 1894 pp 111 112 *Central Provinces*, see Central Provinces Gazette, 1904, Pt III p 218

71 In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially

Collector deemed to be acting judicially

Act XIV of 1882 sect 320 fifth para

[illegible] 32 was confined to bringing [illegible] meaning of Act XVIII of [illegible]ld that Collectors acted as ministerial officers of the Court and subject to its revision[5] But the alteration in this section seems to override that decision

72 (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceedings to a sale of the land or share

Where Court may authorize Collector to stay public sale of land

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable

Act XIV of 1882, sect 326 This section applies to H C

[1] Daulat v Jugul Kishore (1900) 22 All, 108
[2] Mathuradas v Panhalal (1895) 19 Bom, 216
[3] Mathura Das v Jamna Prasad (1903) 25 All 305
[4] Sadho Chaudhri v Abhenandan (1904) 26 All 101.
[5] Lallu v Bhavla, (1887) 11 Bom, 478

This section does not apply to a decree which directs the sale of land or a share in land in pursuance of a contract specifically directing it [1]

Court may authorize —The Court has a discretion and before passing final orders it should hear any objections raised by the parties [2]

The only indulgence a Court can grant under this section is to allow the judgment debtor a reasonable time to satisfy the decree by temporary alienation or management of his share it does not authorize a Court to allow payment by instalments not mentioned in the decree,[3] and the debtor to retain possession of his land either for self or as guardian of her minor son,[4] and where a Collector considered that the lands of a judgment debtor should be exempted from auction sale and the judgment debtor should be allowed to pay by instalments extending over twelve years it was held that the arrangement could not be supported [5]

Specific performance —No decree can be given against the owner to sell land under the management of the Collector [6]

Limitation —As to effect of management by Collector upon limitation, see *Girdhar Das v Har Sankar* [7]

DISTRIBUTION OF ASSETS

Proceeds of execution sale to be rateably distributed among decree holders

73 (1) Where assets are held by a Court, and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons

Provided as follows —

(*a*) Where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ,

(*b*) Where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;

[1] Bhagwan Prasad v Sheo Sahai (1879 80) 2 All 8›6

[2] Hurro Prosad v Kali Prosad, (1883) 9 Calc 290

[3] Sheo Pershad v Shiva Ram (1870) 2 All, H C , 9

[4] Kashee Lal v Ameer Jan, (1870) 2 All H C , 347

[5] Muttra Pershad v Ram Pershad (1874) 6 All H C 39 Huro Prosad v Kali Proshad (1883) 9 Calc , 290

[6] Seth Jaidayal v Ram Sahae (1890) 17 Calc , 432

[7] Girdhar Das v Har Sankar, (1898) 20 All , 383

(c) Where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale,

secondly, in discharging the amount due under the decree

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any), and,

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets

(3) Nothing in this section affects any right of the Government

Act XIV of 1882 sect 295 This section applies to H C and Prov S C C See note under Section 63

Application of the section —The purport of this section is not to alter or limit the rights of parties arising out of a contract but simply to determine questions between rival decree holders standing on the same footing and in

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[1] Hasoonarra *v* Jawaloonnissa (1879) 4 Calc. 29

[2] Raj Chunder *v* Hur Mohan (1875) 24 W R, 98

[3] Janoky Ballabh *v* Johiruddin (1884) 10 Calc, 576 Shahi Ram *v* Shib Lall, (1885) 7 All, 378

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1 Bhagwan Prasad v Sheo Sahai (1879 80) 2 All , 806

2 Hurro Prosad v Kali Prosad, (1883) 9 Calc , 290

3 Sheo Pershad v Shiva Ram (1870) 2 All, H C , 9

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6 Seth Jaidayal v Ram Sahae, (1890) 17 Calc , 432

7 Girdhar Das v Har Sankar, (1898) 20 All , 383

Regular suit—*Cause of action* The cause of action does not arise until the money is paid[1] An order under this section for the payment of surplus sale proceeds to the assignee of a bid in a mortgage in execution of a first mortgage-decree bars a suit for the surplus sale proceeds at the instance of a purchaser of the equity of redemption of the mortgagor[2]

Jurisdiction—A Small Cause Court cannot try a case for refund of assets paid under this section[3]

No res judicata This section prescribes a distribution of the sale proceeds to be made according to what may seem at the time to be the rights of the parties, without such distribution importing a conclusive adjudication on their rights[4]

Limitation If the Court making the distribution possesses jurisdiction, the regular suit must be brought within one year from the date of the order[5]

Parties—All the parties to the distribution should be made parties to the suit[6]

The same judgment-debtor Where there is one decree against A and another against A and B and the decree holders apply for execution against A this section applies[7] and the same rule applies if there is a money decree against B and K and D holds a money decree against B and for enforcement of a hypothecation by sale of property against P, R and S, and execution is taken out against B[8] but otherwise if a creditor had a decree against A and B and executed it by sale of the joint prope
A alone[9] A decree against A and B per
personally and B as representative fall within
a decree against X Y and Z and B obtained a
held that the case fell under this provision[11]
creditor was against a father and the decree of another was against the father and son, but the properties from which the assets had been realised were

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[1] Hart v. Tara Prasanna, (1885) 11 Calc., 718

[2] Hurdwar Singh v. Bhawani Persad (1898) 2 Calc. W. N., 420

[3] . . . co also Girish Chunder v. Durga . . . v. Subramanya (1886) 9 Mad., . . . 9) 3 All., 59, in which it has been cognizable in a Court of Small Causes

[4] Shankar Sarup v. Mejo Mal, (1901) 23 All., 313, L. R., 28 I. A., 203, (1901) 5 Calc. W. N., 649 (P. C.)

[5] Gouri Prosad v. Ram Ratan, (1886) 13 Calc. 159, see however, Tayomdi v. Mathura Lal (1886) 12 Calc., 409 not so in Madras—Sivarama v. Subra . . . v. Achut (1891) 15 Bom., 313, L. R., 28 I. A., 203, . . . he Court has not jurisdic . . .

[6] Gouri Prasad v. Ram Ratan, (1886) 13 Calc., 159, Brojo Kauth v. Banee, (1875) 23 W. R., 434

[7] Sumbhoo Nath v. Luckhynath, (1883) 9 Calc., 920 Grant v. Subramaniam, (1899) 22 Mad., 241, and see Chota Lal v. Nalabhai (1905) 29 Bom., 528, 7 Bom. L. R., 67

[8] Delhi Bank v. Uncovenanted Service Bank, (1888) 10 All., 35

[9] . . . , overruled—Gonesh Dass v. Shiva . . . 30 Calc., 583, Chatrapat Singh v. . . . ut see Surat Chundra Kundu v. . . . 68

[10] Hart v. Tara Prasanna (1885) 11 Calc., 718, p. 728 See also Nimbaji Tulsiram v. Vadia Venkati, (1892) 16 Bom. 683, and Gobind Ahaji v. Mohoniraj Vinayak, (1901) 25 Bom., 494 And see Gotti Lal v. Bir Bahadur Sahai, (1905) 27 All., 158

[11] Gonesh Das v. Shiva Lakshman, (1903) 7 Calc. W. N., 414, 30 Calc., 583. See Bithal Das v. Nand Kishore, (1901) 23 All., 106

ancestral properties of the family, of which the father and son were undivided members, *held*, that the decrees were against the same judgment debtor [1]

Decrees for payment of money.—(See section 34 *ante*) A decree for mesne profits is a money decree [2] Every decree by virtue of which money is payable is to that extent a decree for money, even though other relief may be granted by the decree [3] A decree against A and B, which so far as B is concerned, is a decree to enforce a hypothecation by sale of their property but does not direct the sale of specific property of A, is as regards him a money decree [4] A judgment under s 86 of the Insolvent Act is a money decree [5] Where a mortgagee obtains a decree declaring that the debt may be realised by sale of the mortgaged property, he may waive his lien and proceed under this section,[6] and he is not compelled to proceed first against the mortgaged property [7] In Madras it has been held that a decree directing the sale of mortgaged properties in default of payment of money is a decree for money [8]

Good faith—The Court should exclude persons not *bona fide* decree holders [9] After an order has been made under this section any decree holder may sue, before distribution, for a declaration that another decree is collusive [10]

Assets held by a Court—These words have been substituted for "realized in execution," a phrase which evoked a number of judicial decisions [11] They mean presumably assets available for distribution and would not cover a deposit by a

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1 Ramanathan Chettiar v Subramania Sastrial, (1903) 26 Mad, 179

2 Viraraghava v Varada, (1882) 5 Mad, 123

3 Hart v Tara Prasanna, (1885) 11 Calc 718, but see Fazil Howaldar v Krishnabundhu Roy, (1898) 25 Calc, 580, 2 Calc W N, 118, in which it was ruled that a decree which directs the realisation of the decretal amount from the hypothecated property, and if insufficient, makes the defendant rem[...] personally liable is a mortgage decree and not a decree for the pay[...] m[...] money See also Kartick Nath v Juggernath Ram, (1900) 27 Calc, [...]d Jadunath v Jagumohan Das, (1903) 25 All, 541

4 [...]k v Uncovenanted Service Bank, (1888) 10 All, 35, and see Gur[...] Ram Dial, (1875) 7 All H C, 91, Jagat Narain v Dhundhey, (1883) [...]6

[...]s, *in re*, (1884) 8 Bom, 511

[...]sh v Chutturdharee (1870) 14 W. R, 209 Radha Kant v [...] (1874) 21 W. R, 86

[...] Prasanna, (1885) 11 Calc, 718, Kalee Prasad v Rayo Kishoree, [...] R, 281. *But see Delhi Bank v Uncovenanted Service Bank,* [...]1 35.

[...]y v Somasundiam, (1905) 28 Mad, 473

[...]e, (1885) 11 Calc, 42, Chhaganlal v Fazarali, (1889) 13 Bom,

[...]n, (1906) 3 Calc L J, 385

[...]hai, (1904) 28 Bom, 264, Fink v Bahadur Singh, (1899) 26 Calc W. N, 27

[...]aiez Mahomed v Damodar, (1891) 18 Calc, 242

13 Gopal Dai v Chunni, (1886) 8 All, 67

14 [...]ew Bux v Shib Chunder, (1886) 13 Calc, 225

[...] Purshotum Dass v Mahanant Surajbharti, (1882) 6 Bom, 588

16 Chu[...]rosonnomoyi Dassi v Sreenath Roy, (1894) 21 Calc, 809 Approved in, Vibudhapriya v Yusuf Sahib, (1905) 28 Mad, 380, and compare Westacott v

17 Bai[...]evan, (1891) 1 Q B, 774

section [1] and so are sums paid into Court as purchase money before confirmation of sale [2]

Interest —Rent taken in lieu of interest by a mortgagee is not within the section [3]

Attachment before judgment Creates no charge so that if another

in the distribution of property he has attached There is no necessity to re attach, but an application for execution is imperative [5] After attachment of a debt before judgment the debtor gave an equitable assignment of it subject to the attachment *held* this assignment was not good against other creditors who applied for execution under this section before the date of payment to the Sheriff of the debt [6] Insolvency after attachment has no effect [7]

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Rateably All will share equally in the surplus after deducting the costs of realization there is no priority, except perhaps in the case of Crown debts,[9] or of rent realised by the sale of the house or building for which it was due [10] A judgment creditor has no priority over the Official Assignee in respect of property attached by him previous to the passing of the vesting order [11]

The Official Assignee may apply to the Court which has passed an order under this section to have that order restricted to the period previous to the date of the vesting order [12]

The holder of a decree for unascertained mesne profits who has applied for
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premises, which did not realize the amount of his debt He then applied for rateable distribution with the defendant This being refused, he sued to recover the sum which would have been payable under this section, *held*, that the plaintiff's decree was a decree for money and he was entitled to recover [14] If

Sorabji v Govind, (1892) 16 Bom , 91

[2] Vishvanath v Vir Chand (1882) 6 Bom , 16 , compare, Bishen Chunder v Munmohinee, (1867) 8 W R , 501

[3] Sivarama v Subramanya, (1886) 9 Mad , 57

[4] Sewdut v Sree Canto Maity, (1906) 33 Calc , 639 , 10 Calc W N , 634

[5] Pollonji v. Jordan, (1888) 12 Bom , 400

[6] Sorabji v Govind, (1892) 16 Bom , 91

[7] Viraraghava v Parasurama, (1892) 15 Mad , 372

[8] Link v Moharaj Bahadur, (1899) 26 Calc , 772 , 4 Calc W N , 27

[9] Secretary of State v Bombay Landing Co , (1868) 5 Bom H C , 53

[10] Maniklal v Lakha (1880) 4 Bom , 429 See also Soobul Chunder v Russick Lall (1888) 15 Calc , 202

[11] Peacock v Madan Gopal, (1902) 6 Calc W. N , 577, overruling Miller v. Lakhimoni (1901) 5 Calc W. N , 761

[12] Howatson v Darant (1900) 27 Calc , 351 , 4 Calc W N., 610.

[13] Viraraghava v Varada (1882) 5 Mad , 123 , but see Binda Bibee v Lalla, (1874) 21 W R , 66

[14] Kommachi Kather v Pakker (1897) 20 Mad , 107 , but see Kartick Nath v Jugger Nath Ram (1900) 27 Calc , 285, and Jadu Nath Prasad v Jog Mohan Das, (1903) 25 All 511.

a mortgagee receives any money out of the surplus sale proceeds of a share of the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained he is bound to apply the money to the satisfaction of his mortgage debt only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them [1] A Muhammadan widow who has obtained a decree for dower against the other heir of her deceased husband is entitled to priority over the holder of a money decree against the heir for his personal debt, and the latter is not entitled to the benefit of this section [2]

The properties of the judgment debtor were brought to sale at the instance of one judgment creditor in two parcels After proceeds of the first parcel had been brought into Court and before the proceeds of sale of the second parcel has been so paid in, the petitioner (also an execution creditor) applied under this section *Held* that he was entitled to participate in a rateable distribution in the proceeds of sale of both parcels [3]

Legal representative — The legal representative of a deceased judgment debtor is eligible if he has bought the decree against his predecessor [4]

Sold subject to mortgage —The provisions of the first paragraph, clauses (a) and (b), have reference only to sales under simple money decrees and declare the incompetence of a mortgagee as such to any share of the surplus proceeds when the property is sold subject to his mortgage,[5] otherwise, if he consents to sell the property free of lien [6] And if the property be sold under a mortgage decree, a prior incumbrance is not taken into account [7] This section refers to cases in which the property is sold subject to a mortgage and not to cases where property, subject to an undisclosed mortgage is sold in execution [8] The Court has jurisdiction to inquire into the merits of the alleged mortgage [9]

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it were free from mortgage, the mortgagee would probably have a good action against him for payment,[11] and where in execution of a decree, the right, title, and interest of the judgment debtor in certain property were sold by the decree holder, but without notice of a mortgage held on it by him, it was held that the absolute right passed as against the decree holder to the purchaser, that neither

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1 Gangaram v Jaiballav Narain (1903) 30 Calc, 953.

2 Bhola Nath v Maqbulunissa, (1904) 26 All, 28

3 Ramanathan Chettiar v Subramania Sastrial, (1903) 26 Mad 179

4 Manmohan v Virbai, (1889) 13 Bom, 171.

5 Futeh Ali v Gregory, (1866) 6 W. R, Mis 13.

6 Fukeer Buksh v Chuttundharee (1870) 14 W R 209, 12 B L R, 513, Purmessuree Dossee v Novin Chunder, (1875) 24 W R 305

7 Jagat Narain v Dhundhey, (1883) 5 All, 566

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9 Purshotam v Dhondu, (1882) 6 Bom 582 Vishnu Dikshit v Narsingrav, (1882) 6 Bom 584

Taponidi v Mathura Lall, (1886) 12 Calc, 499

11 Douglas v Collector of Benares, (1849 54) 5 Moo I A, 296

he nor the assignee of the decree on the mortgage bond could realise the latter debt by sale of the same property, because the vendor had suppressed the fact of the charge and thereby induced the first purchaser to buy [1] Where a mortgagee had got separate decrees for instalments under one bond, their lordships of the Privy Council seemed to think that the property should not be sold under one decree subject to the mortgage lien of the other [2]

Incumbrance —See *Mitthu Lal v Kishen Lal* [3] In a suit on an instalment bond, plaintiff having obtained a money decree asked for and obtained the residue of the sale proceeds after all the judgment creditors had been fully satisfied It was held that by doing so, he did not abandon his right as mortgagee [4]

Sale-proceeds —The Court may allow a decree holder to take out the purchase money before confirmation of sale [5]

Surplus sale-proceeds —When surplus sale proceeds are deposited in Court the Judge should pay out the money only to the party in whose name it stands, or his agent [6] Where a holder of a Small Cause Court decree did not have his decree transferred to the High Court, where certain property of the judgment debtor had been sold in execution of other decrees against him, it was held that he was not entitled to a share in the rateable distribution [7]

Step in aid of Execution —An application by a decree holder to withdraw monies to which he is entitled under this section is a step in aid of execution [8]

Appeal —No appeal lies from an order under the corresponding section of Act XIV of 1882 [9]

Refund of money paid —See *Gogaram v Kartic Chandra* [10]

RESISTANCE TO EXECUTION

Resistance to execution

74 Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted

[1] Doollub Sircar v Kristo Koonar (1869) 12 W R 303 3 B L R 407

[2] Dosibai v Ishvardas (1891) 15 Bom 222 L R 18 I A 22 and see Ballam Das v Amar Raj (1890) 12 All 537

[3] Mitthu Lal v Kishen Lal (1890) 12 All 546

[4] Bolakee v Chowdhry Bungsee (1867) 7 W R 309

[5] Vishvanath v Virchand (1882) 6 Bom 16 Jogendro Nath v Gobind (1886) 12 Calc, 252 See however Mahomed Ali v Damodar (1891) 18 Calc 242

[6] Puddabutty Dossia in the matter of, (1869) 12 W R 352

[7] Nimlaji Tulsiram v Vadia Venkati (1892) 16 Bom 683 Andanapa v Bhimrao Annaji (1895) 19 Bom 543 and contra Har Bhagat Das v Anandaram (1897) 2 Calc W N 126 For an illustration of the converse case i e where the holder of a Small Cause Court decree did have his decree transferred for execution to the High Court see Jaynarayan Meghraj v Ismail Karamali (1896) 20 Bom 377

[8] Baij Nauth v Ghan Shyam Dass (1904) 8 Calc W N, 382

[9] Kashi Ram v Mani R [illegible] Kartic Chunder (1868) 9 W R 514 [illegible] v Seshayyangar 4 Mad 383 Sew [illegible] 225 in the case of Venkataraman v [illegible] the Court did not interfere, other [illegible] 392) 15 Mad 372

[10] Gogaram v Kartik Chandra, (1868) 9 W R 514

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ART III.

TAL PROCEEDINGS.

COMMISSIONS

h conditions and limitations as may prescribed, the Court may issue a mission—

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or adjust accounts or

partition

marises the general powers of the Court as detailed Act XIV of 1882 The provisions of those sections are nder Order XXVI in the commentary to which the ct will be found collected

(1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is ... te and having jurisdiction in the place in which the ... to be examined resides

Commission to another ...rt.

(2) Every Court receiving a commission for the ...ination of any person under sub section (1) shall ...mine him or cause him to be examined pursuant thereto, ... the commission, when it has been duly executed, shall ...eturned together with the evidence taken under it to ... Court from which it was issued, unless the order for ...ing the commission has otherwise directed, in which ...o the commission shall be returned in terms of such ...der

Act XIV of 1882 sect 386

77 In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India

Letter of request

This Section introduces a new power following the English practice under R S O 37 r 6a In England it has been held that the letters of request ought only to be issued where the evidence would be material to the case and not merely collateral evidence in corroboration Letters of request will not be issued in England merely to obtain inspection of documents and this section refers only *to the examination of a witness out of British India* For the English forms and the practice generally see O 37 r 6a Ann Prac (1908) 506

78 The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by—

Commissions issued by foreign Courts

(*a*) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor General in Council or

(*b*) Courts situate in any part of the British Empire other than British India or

(*c*) Courts of any foreign country for the time being in alliance with His Majesty

Act XIV of 1882 sect 391 This section applies to H C and Prov S C C

The provisions presumably refer to the foregoing section but possibly it is intended to include rules made thereunder

This section is confined to commissions for the examination of witnesses

T IV.

ICULAR CASES.

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ts by or against the Govern instituted by or against the State for India in Council in shall be deemed to limit information exhibited by il in exercise of the power ... III of the East India Com ... Act, 1813

33 Geo ... c 155

Act XIV of 1882, Sect 416

This section applies to H C and Prov S C C

Notice —See section 80

Form of suit —An action cannot be maintained against 'The Secretary of State It must be brought against 'The Secretary of State for India in Council'[1] This error may be waived directly Thus where A was sued as "Agent to the Governor General on the part of Government, and defended the suit *on behalf of Government through the Government pleader, it was held to be* substantially a suit against Government[2]

The Secretary of State must be sued where the cause of action has arisen[3] He cannot claim the benefit of Act XVIII of 1850 protecting judicial officers[4]

The Government of India is not a corporation[5]

Amendment—Where a suit was wrongly brought against a Magistrate, the Bombay High Court in regular appeal allowed the name of the Magistrate to be struck out and that of "The Secretary of State for India in Council to be inserted[6]

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[1] P & O S N Co *v* Secretary of State Bourke 166 (1868) 5 Bom H C App 1 Nobin Chunder Dey *v* Secretary of State, (1876) 1 Calc, 11 p 14 (1875) 24 W R 309, 21 & 22 Vic, cap 106 s 65

[2] Roopan Towarce *v* Buckle (1868) 10 W R 142 and see also Municipal Committee of Moradabad *v* Chatri (1876) 1 All, 269

[3] (1862 3) 1 Mad H C 286, ... de 37 See also Hearsay *v* ... ya Narain *v* Secretary of State,

... Vijay ... *v* ... Nar ... the ... Balaram ... gi ... ll *v* Ram

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PART IV.

SUITS IN PARTICULAR CASES.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

Suits by or against Government

79 (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power 53 Geo III c 155 declared by section III of the East India Company Act, 1813

Act XIV of 1882, Sect 416

This section applies to H C and Prov S C C

Notice —See section 80

Form of suit —An action cannot be maintained against "The Secretary of State It must be brought against 'The Secretary of State for India in Council [1] This error may be waived directly Thus where A was sued as "Agent to the Governor General on the part of Government and defended the suit on behalf of Government through the Government pleader, it was held to be substantially a suit against Government [2]

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[2] Roopai Tewaree v Bickle (1868) 10 W R 142 and see also Municipal Committee of Moradabad v Chatr (18 6) 1 All 269

[3] Subbaraya Mudal v Government 1 Cunliffe (1863) 1 Mad H C 286, Rundle v Secretary of State (1862) 1 Hyde 37 See also Hearsay v Secretary of State (1874) 6 All H C 47 Doya Narain v Secretary of State, (1887) 14 Calc 2 6

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[6] 6 0 Balaram ... uni Lall v Ram

commissioner [1] But where an officer in the Public Works department entered into a contract in excess of his authority, it was held that Government was not bound by it [2]

Not an act of State — Lands were held as *jaghir* under the Sovereign of an independent State, and on the conquest of the territory by the East India Company the *jagheerdars*, remained in the same position towards the Company, *held*, the seizure of the tenure, and the arms and stores pertaining to it after the death of the *jagheerdars*, was not an act of State Their lordships of the Privy Council said — 'The act of Government in this case was not the seizure by arbitrary power of territories, which up to that time had belonged to another Sovereign State, it was the resumption of lands previously held from the Government under a particular tenure upon the alleged determination of that tenure The possession was taken under colour of a legal title that title being the undoubted right of the sovereign power to resume and retain or assess to the public revenue all lands within its territories upon the determination of the tenure under which they may have been exceptionally held rent free If, by means of the continuance of the tenure, or from other cause a right be claimed in derogation of this title of the Government that claim like any other arising between the Government and its subjects, would *prima facie* be cognizable by the Municipal Courts of India [3]

Government confiscated the property belonging to certain rebels and put it up for auction sale to the highest bidder without reserving any right to object to the purchaser The Government refused to perfect the sale and in a suit for specific performance raised the defence that it was an act of State Their lordships of the Privy Council said — It has been said that this suit could not be instituted by the respondent, inasmuch as what was done was an act of State which could not be called in question The meaning, as their lordships understand it of an act of State is something which pertains to the functions of Government Suppose, for instance any question has arisen with regard to the propriety of confiscating the rebels property that would have been an act of State Probably the determination of the Government to sell that confiscated property might also be treated as an act of State but in the sale the Government was exactly in the situation of an individual selling his property by auction, and when the property was knocked down, the relation of vendor and vendee existed between the Government and the highest bidder [4] And where the East India Company when called upon to account for the property of a deceased State prisoner, answered that they had dealt with it as sovereigns their answer was set aside [5] And the distinction is that Government is liable for acts professed to be done under a municipal law but not for acts done in the exercise of its sovereign power, which are not professedly justified by municipal law [6] A suit will lie against Government to set aside a settlement and obtain possession and in such Government should be a party [7] to declare that certain lands are not liable

[1] Vijaya v Secretary of State (1884) 7 Mad 466

[2] Beer Kishore v Government of Bengal (1872) 17 W R 497

[3] Forester v Secretary of State (1873 4) 12 B L R 120 (1872) 18 W R P C 349 I R I A Sup Vol 10 see also the case of Vizaramarazu v Secretary of State (1882) 5 Mad 91 Hari v Ajmuddin (1887) 11 Bom, 235

[4] Sh

(1882) 5 Mad 273 See also Kishen Chand v Secretary of State (1881) 3 All 829

[5] Essadah Bye v East India Company (1850) 1 Tay and Bell 290

[6] Secretary of State v Hari Bhanji (1882) 5 Mad 273 see also Walker v Laird App Cas (1893) 491

[7] Mahomed Israil v Wiso (1874) 21 W R 327 Krishno Lall v Bhyrub Chander (1874) 22 W R 52 but see Krishna Chandra v Harish Chandra, (1871) 8 B L R, 524

to assessment because they are included in a permanently settled estate,[1] to contest an order to pay revenue at an mance of a contract of sale [3] for damages c servant ,[4] or other breach of contract ,[5] l Magistrate taking up a public ferry [6] nor
The action taken by the revenue authorities under Act IX of 1847 is final, and cannot be questioned but that does not debar a proprietor from bringing be at any settlement that may *forms part of a permanent*

Practice —To quest on an act of State directly or indirectly, the contention should be raised in a suit to wh ch the Government has been made a party [9] Where the lands the subject of the suit are stated to be *chowkidaree* or *ghat calee*, Government should be made a party [10] So in a suit to recover possession of a *chur* which had been leased to defendant , *held* Government a necessary party [11]

80 Notice

No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims , and the plaint shall contain a statement that such notice has been so delivered or left

Act XIV of 1882 sect 424 This section appl es to H C and Prov S C C

Suits of the class ment oned in s 77 of the Punjab Tenancy Act (XVI of 1887) are exempted from the operation of this section See s 94 of that Act The language of this section is imperative and absolutely debars a Court from entertaining a suit instituted without compliance with its provisions A Court cannot under such circumstances stay proceedings and allow time to the plaintiff *to serve the requisite notice, but its only course is to reject the plaint under*

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[1] Secretary of State v Fahamidannissa, (1890) 17 Calc , 590, L R , 17 I A , 40

[2] Kebul Ram v Government, (1866) 5 W R 47

[3] Rundle v Secretary of State, (1862) 1 Hyde, 37

[4] Hughes v Secretary of State, (1871) 7 B L R , 688

[5] Ross Johnson v, Secretary of State (1864) 2 Hyde, 153

[6] Collector of Pubna v Romanath Tagore, (1867) 7 W. R , 191 , B L R , Sup. Vol , 630

[7] Narain Chunder Chowdhary v Tayler (1879) 4 Calc , 103

[8] Secretary of State v Ram Ugrah (1885) 7 All , 140

[9] Umjad Ally v Mohumdee Begum, (1866 7) 11 Moo I A , 517 , (1868) 10 W. R , P C , 25

[10] Collector of Beerbhoom v Mooktakkessee Dabeah, S D , 4th July 1860

[11] Cannon v Bissonath Adhicari, (1879 80) 5 C L R , 154

Order VII r 11.[1] But it has been said that notice may be waived or the Defendant may be estopped from raising the defence at all.[2]

Act done in official capacity Where a Collector thinking three Mamlatdars had no right to give plaintiff certificates destroyed them, it was *held* to have been done in his official capacity.[3] But where a minor under the Court of Wards was sued for a debt due by his father and the Collector was appointed guardian *ad litem*, *held* notice was not necessary.[4] The plaintiff sued the defendant a public officer to recover damages for wrongful arrest and trespass *Held* that the former Act was done by the defendant in his official capacity, that it was doubtful whether the latter act was so or not but as both acts were mixed up in the plaint and damages claimed for both the suit was rightly dismissed for want of two months notice and permission to amend the plaint so as to restrict the suit to one for damages for the trespass only, should not be allowed on appeal to the High Court.[5] In no case is a suit maintainable against the Secretary of State unless the notice prescribed by s 80 has been given.[6] Notice was held to be necessary in a suit for refund of money alleged to have been illegally exacted by a toll collector under Bengal Act, IX of 1871.[7]

Adding parties It has been held that this section does not prevent a Court adding the Secretary of State as a party to a suit,[8] but he is not a necessary party to a suit to set aside a revenue sale.[9]

Notice when required —A public officer is entitled to notice only in those cases in which he is sued for damages on account of some wrong inadvertently committed by him in the discharge of his duty.[10] Such as a suit against a police officer for seizure of goods during a search.[11] Notice is not required where the suit is *ex contractu*.[12] In the case of any amendment necessitated by alleged discovery of facts unknown to the plaintiff the Secretary of State does not require a further notice of two months, and no separate notice is required against a public officer sued along with the Secretary of State, when he is not sued for any act done by him independently of Government and no separate relief is asked for against him.[13]

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1 Bachchu Singh v Secretary of State, (1903) 25 All, 187

2 Manindra v Secretary of State (1907) 5 Calc, L J, p 168

3 Swamirayacharya v Collector of Dharwar, (1891) 15 Bom, 441.

4 Ananthraraman v Ramasami, (1888) 11 Mad, 317.

5 Jogendra Nath Ray v Price, (1897) 24 Calc, 584

6 Secretary of State v Rajluckhi Debi, (1898) 25 Calc, 239
Ram Pitam v. Shoobul Chunder, (1888) 15 Calc, 259

8 Bal Mokoond v Jirjadhun (1883) 9 Calc, 271

9 Balkishen Das v Simpson, (1898) 25 Calc, 833, L. R., 25 I A, 151, 2 Calc W N, 513

1 Shahunshah Begum v Fergusson, (1881) 7 Calc, 499 followed in Raghubans v Phool Kumari (1905) 32 Calc 1130, Chunder Sikhur v Obhoy Churn, (1881)
, 580,
Nana,
, Joshi
Board,
Singh,
, 296,
, 317
, 102,

11 Bakhtwar v Abdul, (1907) 29 All., 567, A W N, 170.

12 Rajmal Manikchand v Hanmant Anyaba (1896) 21 Bom, 697, Maneklal v Bombay Municipal Commissioner, (1895) 19 Bom, 407.

13 Ezra v. Secretary of State, (1903) 30 Calc., 36, 7 Calc W. N, 249

—The notice to be served under this section
e legal representative of the person who died
nd entitle the representative to sue without
fresh notice[1] No notice is necessary when the remedy sought is an
inju the case, no injunction can
be fact of the plaintiff seeking
his notice under this section[3]
When it was found that a Police Officer did not act in good faith, but took advantage of his position to commit illegal and tortious acts, maliciously and without cause, it was held no notice was required[4]

Form of notice—A notice objecting and asking for a re consideration of the order complained of is not sufficient[5]

It must state the cause, but not the form of the action,[6] and the relief which he claims, and no other cause of action can be raised at the trial[7] The section, in short, requires that the intending plaintiff should substantially inform the officer of the ground of complaint so as to enable him to see if there is any *ground for the action*,[8] *he should, therefore set forth sufficiently clearly* the grounds of the complaint[9] Lastly the notice should give the name and place of abode of the party intending to sue[10] A notice is not invalid because given by only two out of three plaintiffs[11]

A notice under this section is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed[12]

Service—The notice must (in the case of a public officer) be served personally or left at his office The day of serving the notice and that of bringing the action must be both excluded in computing the two months[13]

Public Officer—A Collector appointed to manage a minor's estate is a public officer within this section[14] or acting as agent of the Court of Wards,[15] so is the Administrator General[16] A Nazir appointed as guardian *ad litem* of a minor is not[17] See cases under 'Public Officer' sec 2, p 29 *ante*

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[1] Bachchu Singh v Secretary of State (1903) 25 All, 187 See also Patel Panachand v Ahmedabad Municipality (1898) 22 Bom, 230, Ranchordas v Municipal Commissioner of Bombay (1901) 25 Bom, 387

[2] Flower v Local Board (1877) 5 C D, 347

[3] Hari Pandurang v Secretary of State, (1903) 27 Bom, 424, see p 450

[4] Muhammad Saddiq v Panna Lal, (1904) 26 All, 220

[5] Abhoyanath Bose v Kishnaghur Municipal Commissioners, (1867) 7 W. R 92

[6] Sabin v De Burgh, 2 Camp, 196

[7] Ullman v Calcutta Justices (1871) 8 B L R, 265

[8] *Jones v Bird (1822) 5 B & Ald*, 837, *Parbutti Churn v* Nobin Chundra (1883) 13 C L R, 195

[9] Smith & Co v West Derby Local Board, (1878) 3 C P D, 423

[10] Dwarkanath Gupto v Corporation of Calcutta, (1901) 18 Calc, 91 See on this, James v Swift (18..) 4 B & C, 681, and also Fakes v Municipal Commissioners of Madras, (1891) 14 Mad, 180

[11] Secretary of State v Perumal Pillai, (1891) 24 Ma[illegible]

[12] Jehangir Cursetji v Secretary of State, (1903) 27 B[illegible] 189

[13] Young v Higgon, (1840) [illegible] 49

[14] Nursinggrav v Luxuman [illegible] om, 318

[15] Collector of Bijnor v Mu[illegible], 20

[16] Bholaram v Administrato[illegible] 8 Calc

[17] Mohan Ishwar v Haku R[illegible] 638
(1881) 5 Bom, 3[illegible] nor[illegible]
11 Mad, 117 [illegible]

Statement in plaint — The portion of this section containing a statement that a notice has been left or delivered in the prescribed manner may be regarded as separable from the earlier portion of the section. It is only when notice is not given that the suit is liable to be dismissed. The suit may be proceeded with if notice has been given in the manner prescribed, and subsequently the plaint is amended in order to state that fact [1]

Special Appeal — Want of notice cannot be pleaded for the first time in special appeal [2]

81 In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

Exemption from arrest and personal appearance

(*a*) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and

(*b*) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person

Act XIV of 1882, Sects 425 and 428. This section applies to H C and Prov S C C

This section has been inserted to afford the same protection to the defendant ... against ... exempt

82 (*1*) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government

Execution of decree

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report

Act XIV of 1882 sect 429. This section applies to H C and Prov S C C

Execution shall not issue before three months and until the period mentioned in the decree has expired

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS

83 (*1*) Alien enemies residing in British India with the permission of the Governor General in Council, and alien friends, may sue

When aliens may sue

[1] Bholaram v Administrator General (1904) 8 Calc W N, 913

[2] Municipal Committee of Allahabad v Chatri Singh, (1876) 1 All, 269; President of the Taluk Board Sivaganga v Narayanan, (1893) 16 Mad, 317

in the Courts of British India, as if they were subjects of His Majesty

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts

Explanation —Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of sub-section (2) be deemed to be an alien enemy residing in a foreign country

Act XIV of 1882 sect 430 This section applies to H C and Prov S C C

When foreign States may sue

84 (1) A foreign State may sue in any Court of British India

Provided that such State has been recognized by His Majesty or by the Governor General in Council

Provided also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor General in Council

Act XIV of 1882 sect 431 This section applies to H C and Prov S C C

Alien —As to the right of an alien to enter British territory, see *Musgrove v Chun Teeong* [1]

the nnot ause of action [2]

Private rights —That is, those private rights of a State that must be enforced through a Court of Justice as distinguished from its political right [3]

ught the y in which the defendant resides, not the Courts of the country where the cause of action arose, should be resorted to Where a Faridkot Court passed *ex parte* decrees for money against a person who had been treasurer of Faridkot, but at the date of suit had ceased to be such, and was resident in Jhind of which State he was a domiciled subject *held* that such decrees were a nullity by international law and could not receive effect in a British Indian Court [4] But where

[1] Musgrove v Chun Teeong, (1891) App , Cas 272

[2] Emperor of Austria v Day, 2 Giff., 628

[3] Hajon Manick v Bur Singh (1885) 11 Calc , 17

[4] Gurdyal Singh v Raja of Faridkote, (1895) 22 Calc , 222, L R , 21 I A , 171

the defendant is subject of the sovereign both of the place where the judgment of the foreign Court is passed and of the place where he resides at the time of the judgment, it cannot be treated as a nullity[1]

Practice —Foreign States can only obtain relief subject to the rules of the Court and pursuant to its rules of practice and one of the conditions is that, like an individual it will give discovery Where a foreign State is plaintiff, the defendant should apply to it to name some person from whom discovery may be sought and if it refuses the Court will be justified in dealing with the suit as if it were the case of an ordinary individual in which discovery had been refused[2]

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs

85 (*1*) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India or at the request of any person competent in the opinion of the Government to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances acts and applications under this Code may be made or done on behalf of such Prince or Chief

(*2*) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief

(*3*) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto

Act XIV of 1882, Sect 432 This section applies to H C and Prov S C C

A political agent if not specially appointed cannot sue on behalf of a Prince[3]

This provision will not prevent the institution of a suit by an independent

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[1] Mozzim Hossein v Raphael Robinson (1901) 28 Calc, 641 5 Calc W N, 741 See also Christien v Delauney (1899) 26 Calc, 931, 3 Calc W N, 614

[2] United States of America v Wagner L R, 2 Ch App, 590, Republic of Peru v Weguelin, (1875) L R 20 Eq, 140

[3] Venkatrav v Madhavrav, (1887) 11 Bom, 53

[4] Maharaja of Bhartpur v Kacheru, (1897) 19 All, 510

[5] Maharaja of Rewah v Swami Saran, (1903) 25 All, 635

in the Courts of British India, as if they were subjects of His Majesty

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts

Explanation —Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India, shall for the purpose of sub section (2) be deemed to be an alien enemy residing in a foreign country

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Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor General in Council

Act XIV of 1882, sect 431 This section applies to H C and Prov S C C

Alien —As to the right of an alien to enter British territory, see *Musgrove v Chun Teeong* [1]

If the foreign State has been recognised, the recognition is conclusive of the right to sue A foreign State is limited to subjects stated in the text and cannot sue for anything else, infringing its prerogative right does not constitute a cause of action [2]

Private rights —That is, those private rights of a State that must be enforced through a Court of Justice as distinguished from its political right [3]

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action arose, should be resorted to Where a Faridkot Court passed *ex parte* decrees for money against a person who had been treasurer of Faridkot, but at the date of suit had ceased to be such, and was resident in Jhind of which State he was a domiciled subject *held* that such decrees were a nullity by international law and could not receive effect in a British Indian Court [4] But where

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[3] Hajon Manick v Bur Singh, (1885) 11 Calc, 17

[4] Gurdyal Singh v Raja of Faridkote, (1895) 22 Calc, 222, L R, 21 I A, 171

Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property

Act XIV of 1882, sec 483 This section applies to H C and Prov S C C

It appears to the Government —These words have been inserted in sub section (2) to make it clear that the decision of the Government on this point is final and not open to question by the Court [1]

The Rajah of Tipperah is subject to the Courts of British India in respect of the lands held within it otherwise not except in the cases mentioned in this section,[2] and he may institute a suit in his own name through his recognized agent [3] A prince who comes within the section cannot be sued *qua* Zemindar as though he were a private person [4] A suit even with leave is not maintainable unless the condition of sub section 2 in fact exist [5]

Immoveable property —A suit to have maintenance charged on an estate is not a suit for immoveable property [6]

Style of Princes and Chiefs as parties to suits

87 A Sovereign, Prince or Ruling Chief may sue, and shall be sued, in the name of his State

Provided that in giving the consent referred to in the foregoing section the Governor General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name

Act XIV of 1882, sec 434 This applies to H C and Prov S C C

Description —The State should sue by the name by which it has been recognized by this country In a monarchy, all the public rights and interests of the nation are vested in, and represented by the monarch, in a republic, they are the property of the State Hence, in the former case, the suit should be entitled "The Emperor of Austria *v* A", or, "The King of Spain *v* B" in the latter, the name of the State must be used and the plaint should describe the case as "The United States of America *v* A [7]

INTERPLEADER

Where interpleader suit may be instituted

88 Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein

[1] Chandra Lal *v* Awad bin Umar, (1897) 21 Bom, 351

[2] Bir Chunder *v* Ishan Chunder, (1879) 3 C L R 417 see also Rajkumar Nobodip Chundra *v* Beer Chundra, (1876) 25 W R, 404

[3] Beer Chunder *v* Ishan Chunder, (1884) 10 Calc, 136, see also Beer Chunder *v* Raj Kumar (1883) 9 Calc 535, and Maharajah of Bhartpur *v* Kacheru, (1897) 19 All, 510 As to the Raja of Chetrapore see Hajon Manick *v* Bur Sing (1885) 11 Calc, 17 The Dewan of Patudi is a ruling Chief within this section, Kambhai *v* Hamirsingh, (1884) 8 Bom, 415

[4] Maharajah Radha Kishore *v* Gobinda, (1905) 2 Calc L J, 163

[5] Maharajah of Jaipur *v* Lalji, (1907) 29 All, 773, A W N, 95

[6] Beer Chunder *v* Raj Coomar, (1883) 9 Calc, 535, compare Mahalakshmamma *v* Venkataratnamma, (1883) 6 Mad, 83, p 87

[7] United States of America *v*. Wagner, L R 2 Ch App, 582

other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted

Act XIV of 1882, sect 470 This section applies to H C and Prov S C C

The word stakeholder has been eliminated in the re drafting of this section but the effect is similar to the corresponding section of Act XIV of 1882 The substitution of the words debt sum of money etc for payment or property also tends to facilitate the interpretation of the section The provisions of the former Code will be found detailed in Order XXXV of the first Schedule hereto The following decisions of the Courts in England and India may still be of service —

A right of lien is not an interest in the property [1]

An interpleader suit may be instituted when two or more persons advance claims *bona fide* [2] if their claims refer to the same property and to the same extent [3] Against a person in possession [4] who claims no interest himself but is merely a stakeholder [5] so that no question can arise between him and the claimants [6] and who is ready to deliver it to the right owner whether their titles have had a common origin or are independent of each other [7] or their claims have or have not a substantial foundation [8] It is not necessary that the stakeholder should have been sued [9] Separate claims by agents or brokers for commission or brokerage on the same goods would not be claims to the *same debt* so as to fall within the words of this section the claims being distinct[10]

In execution of a decree against B the bailiff A seized certain goods which were released on C paying under protest the sum mentioned in the warrant A paid the money into the office *held* C's remedy was not by interpleading but suing for money had and received [11] But when the bailiff seized certain goods belonging to the judgment debtor but in the possession of a pledgee, it was held that the pledgee was entitled to have the goods released to him by an interpleader suit [12] One Sadananda Ramsarmall, a resident of Hissar, con

[1] Attenborough v St Katharine s Dock Company (1878) 3 C P D 450

[2] New Hamburg and Brazilian Railway W N 1875 p 239

[3] *Hoggart v Cutts Cr & Ph 197 (though this case has been disapproved of in* India—Secretary of State v Mir Muhammad (1862 3) 1 Mad H C, 361 Manoel v Shanghai Bank (1890) 14 Bom 498 see also Attenborough v St Katharine s Dock Company, (1878) 3 C P D, 450

[4] Burnett v Anderson (1816) 1 Mer 405

[5] Prudential Assurance Co v Thomas (1867) 3 Ch App, 74

[6] Bignold v Audland (1840) 11 Sim 23
Tanner v European Bank L R 1 Ex 261

[7] E & W India Dock Co v Littledale (1848) 7 Hare 59

[8] New Hamburg and Brazilian Railway W N 1875 p 239

[10] Greatorex v Shackle (1895) 2 Q B 249 As to interpleader in the case of a stakeholder in a wager, see Shoolbred v Roberts (1900) 2 Q B 497

[11] Cohen v Mullick, 1 Gasper 135

[12] Bhimji Govindji v Monohar Das, (1870) 5 B L R, App 31, 14 W. R, 303

signed 600 bags of rapeseed to one Khimji Kanji of Bombay and delivered them to the plaintiffs for carriage to Bombay. While the goods were in transit, Sadanand, the consignor, ordered the plaintiffs to deliver them to his agent, Ramgopal Fulchand, instead of to the consignee, and Ramgopal requested delivery from the plaintiffs. Before the goods could be delivered, the firm of Sassoon & Co., claimed them, alleging that they had been assigned to them by Khimji Kanji for valuable consideration. The plaintiffs thereupon filed an interpleader suit: *held*, that the interpleader suit had been properly instituted by the plaintiffs so as to entitle them to their costs.[1] Where a party in the position of a mere stakeholder is made a defendant in a suit, his proper course is to pay the money into Court and ask that the parties really interested may be substituted for himself as defendants.[2]

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[1] Bombay, Baroda & C. I. Railway Co. v. Sassoon (1894) 18 Bom. 231.

[2] Vasaram Buttulal v. Commercial Transport Association 2 Ind. Jur. N. S., 113.

other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself

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[11] Cohen v Mullick, 1 Gasper 139

[12] Bhuji Govindji v Monohar Das (1870) 5 B L R, App 31, 14 W R, 303

damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions

This Section refers to H C but not to Prov S C C

The insertion of this new provision enables a suit to be brought for relief against a public nuisance irrespective of special damage As to the Law in England on this subject and the right of private individuals to abate a public nuisance see 2 Sm L C 11th Ed 187[1] The commonest forms of public nuisances are probably obstructions to highways and noxious trades they are to be distinguished from private nuisances such as injuries to private property obstruction of lights or rights of way etc

92 (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate to obtain a decree—

Public Charities

(a) removing any trustee ,
(b) appointing a new trustee ,
(c) vesting any property in a trustee ,
(d) directing accounts and enquiries ,
(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust ,
(f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ,
(g) settling a scheme , or

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1 Campbell v Lloyd (1901) 2 Ch 518

2 See 3 Blackstones Com 216 As to the liability of a corporation or highway authority for acts of misfeasance as opposed to *non feasance* see Thompson v Brighton (1894) 1 Q B 332 and cases there cited Whyler v Bingham, (1901) I K. B 45

(*h*) granting such further or other relief as the nature of the case may require

(2) Save as provided by the Religious Endowments Act, (XX of 1863), no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub section

Act XIV of 1882 sect 539 —This applies to H C

Public purposes —The wording of this section has been altered in redrafting sect 539 but the following decisions under that section still appear to be relevant to the interpretation of these words Suits brought to remedy a particular section [1] Where nei have any interest ent erformance of the prescribed duties, so that the original grantor and grantee and their descendants are alone to be benefited the endowment does not become public if persons are fed at *gurupuja* and a water *pandal* is maintained during the hot season [2] When a certain number of the public had always used a temple and there was attached to it a *dharmsala* and the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavart held* that the intention of the founder was to devote the property to public religious and charitable purposes [3] And where an idol is an ancient one permanently established for public worship and the offerings made to it are more or less of a permanent character they are to be taken to be intended to contribute to the maintenance of the shrine and not to become the personal property of the priest [4] but the mere fact of the owner of land having erected a temple and planted a grove thereon does not of itself, without any further evidence, indicate a dedication to the God, and a cessation of the rights of private ownership in respect of such land [5] It is not essential that the defendants should admit the existence of the alleged public trust [6]

property [7]

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[1] Budree Das *v* Chooni Lal (1906) 33 Calc 789 followed in Ram Das *v* Badri, (1907) 29 All , 27 (1906) A W N 260

[2] Sathappayyar *v* Periasami, (1891) 14 Mad , I P 7

[3] Jugalkishore *v* Lakshmandas, (1899) 23 Bom , 659

[4] Girijanund *v* Sailajanund (1896) 23 Calc , 645

[5] Dakhu din *v* Rahim un nissa (1894) 16 All , 412

QUERE —If ' public charitable purposes apply to the *devasthan* of a temple or idol dedicated merely for the purposes of the temple idol—Radhabai *v* Chimnaji, (1879) 3 Bom , 27 See also Ganesh Dharanidhur *v* Keshavrav, (1891) 15 Bom , 635

VALID WAKF—In order to create a valid wakf, the property must be substantially and not merely colourably dedicated to religious or charitable purposes —Mahomed Ahsanulla *v* Amar Chand, (1890) 17 Calc 498 L R , 17 I A 28, Bikani Miah *v* Sheikh Lall, (1893) 20 Calc 116 Abul Fata Mahomed *v* Rasamaya (1895) 22 Calc , 619 L R , 22 I A , 76 , Phulchand *v* Akbar Yar Khan (1897) 19 All , 211 Mahomed Manawar Ali *v* Rasulan, (1899) 21 All , 329 , see also Mahomed Israil *v* Sashti Churn, (1892) 19 Calc , 412

[6] Shailajananda *v* Umeshananda (1905) 2 Calc L J , 460, Budh Singh *v* Niradbaran, (1905) 2 Calc L J , 431

[7] Jamaluddin *v* Mujtaba Husain, (1903) 25 All , 631

It has been made expressly applicable to both contentious and non contentious cases [1] The section is intended to apply to persons who before its enactment had, or were believed to have no right to take proceedings for the purposes mentioned in the section [2] It contemplates the existence of a dispute of such a public nature that the intervention of the Advocate General is necessary to decide if and by *whom a suit should be brought to establish public rights* [3]

Certain trustees of a religious endowment called Chinchwad *sansthan* sued to set aside a compromise entered into between two rival claimants to the managership of the *sansthan* and to recover back the *sansthan* property assigned to one of them by the compromise *Held* that the suit did not fall under the corresponding section of Act XIV of 1882 [4] A suit to remove the trustees of a public charity and to compel them to account and to make good the losses sustained by the charity in consequence of their default is a suit falling within the scope of this section and must therefore be instituted in the principal Civil Court *i e* the High Court Original side or the District Court [5] A suit for the vindication of the right of management which is vested in and actually being exercised by plaintiffs and those they represent does not fall within this section merely because those who cause the obstruction have been nominated trustees [6] A suit for the appointment of new trustees to a temple on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore vacant is a suit under this section [7] But it does not apply to a suit between two private persons claiming rights as *mutawallis* over *wakf* property [8]

Consent in writing — A suit begun by one plaintiff cannot be made good by adding a second in amendment [9] A suit by one trustee of a public charity *against another for breach of trust requires sanction* [10] *The suit sanctioned must* be the suit brought [11] A suit was instituted by A, who had obtained consent [illegible]

included in the sanction It is not competent to the Court to enlarge the scope of the suit and grant reliefs other than those included in the terms of the sanction [14] The consent in writing must be a specific permission given to two or more persons and is a condition precedent to the institution of the suit [15]

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[1] Mohiuddin *v* Sajiuddin, (1893) 20 Calc, 810, where this point was raised under sect 539

[2] Nellaiyappa *v* Thangama, (1898) 21 Mad, 406, see p 409

[3] Monijan *v* Khadem Hossein, (1901) 9 Calc W N, 151

[4] Dhundiraj *v* Ganesh, (1894) 18 Bom, 721

[5] Hussein Mian *v* Collector of Kaira (1897) 21 Bom, 48 See also Manohar *v* Keshavram (1888) 12 Bom 267, note Before a scheme can be settled for *the management of a temple and its funds an account of the trust property* must be taken—Chotalal *v* Manohar Ganesh (1899) 4 Calc W N, 23, L. R, 26 I A, 199, (1900) 24 Bom, 50 affirming 12 Bom, 247

[6] Navroji *v* Dastur Kharsedji, (1904) 28 Bom, 20

[7] Neti Rama *v* Venkatacharulu (1903) 26 Mad, 450

[8] Monijan *v* Khadem, (1905) 32 Calc, 273 9 Calc W N, 151

[9] Dovnes *v* Jamudin, (1906) 30 Bom, 603, 8 Bom L R, 731

[10] Tricumdas *v* Khimji (1892) 16 Bom, 626, but see Augustine *v.* Medlycott, (1892) 15 Mad, 241

[11] Srinivasa *v* Venkata, (1888) 11 Mad, 148

[12] Ramayyangar *v* Krishnayyangar, (1887) 10 Mad, 185.

[13] Tricumdas *v* Khimji, (1892) 16 Bom, 626

[14] Hussein Mian *v* Collector of Kaira, (1897) 21 Bom, 257

[15] Gopaldei *v* Kannodei, (1904) 26 All, 162.

Sanction by the Court —See note to order 1, r 8 *post*, and a suit under this section will not be bad because the provisions of that rule have not been complied with In Mohiuddin v Sayiduddin,[1] it was said that the right of each worshipper in a Mahomedan mosque or rel gious endo vment is an independent right wholly irrespect of the r ht of other worshippers When plaintiffs are not merely beneficia
the death of the exis
they are ent tled to

Remo ing and appointing Trustees —The express power to *remove* a trustee settles a question which was frequently in issue under this section [3]

The Courts have jurisdiction to deal with the managers of public Hindu temples and if necessary for the good of the religious endowments to remove them from their po ition as managers There is however no hard and fast rule that every manager of a shrine who has arrogated to himself the position of owner shall be removed from his trust each ca e must be decided wi h reference to its

fraudulent and di honest the Court declined to remove the manager but fra ned a scheme for the management of the trust [5] Failure on the part of a trustee to submit accounts to the committee is a breach of one of the most mportant duties
A dismissal of a
mittee is illegal
is to amend the
oval of the trus
tees if nece sary and not to file a separate suit [8] The Naz r of a mosque in Bombay is under Mahomedan law a public officer and liable to acc unt to the community [9] Mere error in judgment on the part of a member of a d vistinuit committee is not suffi ient to disqual fy him [10]

Persons having an interest The words a d rect before interest were repealed by Act VII of 1888 s 44 The interest required to enable a person
and not a mere contingency
ership is not sufficient to give t

Under the Code of 1877 it was decided that persons residing in the village, whose duty was to conduct pilgrims to the shrine and perform the worship of the idol in their behalf had a suffic ent interest to sue[12] and so has any one of *the persons carrying out a charity under the prese it Code* [13] *The pirjan* and five worshipers of a temple may bring a suit to remove a constructive trustee of a temple for misconduct [14]

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[1] Mohiuddin v Sayiduddin (1893) 20 Calc, 816
[2] Kazi Hassan v Sagun Balkrishna (1900) 24 Bom 170
[3] Sajedur v Baidyanath, (1893) 20 Calc 397 Sajedur v Gour Mohan, (1897) 24 Calc, 418, Girdhari Lal v Ram Lal (1899) 21 All 200
[4] Damodar Bhatji v Bhogilal (1898) 22 Bom 493 followed in Prayay Dass v Tirumala (1905) 28 Mad, 319, (1907) 11 Calc W N, 442
[5] Annaji v Narayan, (1897) 21 Bom 556
[6] Anantanarayana v Kuttalam (1899) 22 Mad 481
[7] Thandavarya Pillai v Subbayyar (1900) 23 Mad, 483
[8] Damodar Bhatji v Bhogilal (1900) 24 Bom, 45
[9] Advocate General of Bombay v Abdul Kadir, (1894) 18 Bom, 401
[10] Tiruvengadath v Srinivasa, (1899) 22 Mad, 361
[11] Mohiruddi v Sayidudin, (1893) 20 Calc, 810
[12] Manohar Ganesh v Lakhmiram (1888) 12 Bom 247, s c (1900) 24 Bom 50 (1898 9) L R, 26 I A 199 4 Calc W N, 23
[13] Subbayya v Krishna, (1891) 14 Mad 186
[14] Jugalkishore v Lakshmandas, (1899) 23 Bom, 659

This section is mandatory [1] sub section (2) having been added to clear up the doubts expressed on the point [2] and does not affect those special cases connected with religious uses in which the right of a private individual to sue has not been repealed by the Code, and any person interested in the proper observance of a religious endowment such as the worshipper or devotee of an idol, can sue in his own right to have the trust property administered, or any breach of trust that may have occurred rectified,[3] and so can any representative of the person endowing the property [4] and the Advocate General need not be made a party [5] So a worshipper can sue out a declaration of his right to use a mosque for devotional purposes,[6] or a temple[7] but cannot follow property in the hands of a trespasser [8] It does not apply to persons seeking to follow trust property as managers [9] A plaintiff claimed to be a co trustee of certain *firgis* and entitled to a share in the management and in the profits thereof which consisted of a certain cash allowance from Government He sued the defendants for an account and for recovery of his share *held*, that the suit did not come within the purview of s 539 of Act XIV of 1882 and did not require sanction under that section [10] Neither did a suit for a

Accounts and Enquiries — *The first thing to be done in settling a scheme* is to take an account of the trust property [12]

Pleading —One or more of the reliefs mentioned in sub section (1) should be prayed for otherwise the suit, *if for a mere declaration may not be maintain* able [13] and similarly an application for execution should specify the mode in which the assistance of the Court is sought [14]

Decree —So far as a decree under this section orders particular acts to be performed by the defendants in the management of a temple, it may be enforced by the imprisonment of the defendants or by the attachment of the defendants or by the attachment of their property or by both [15] *New trustees* appointed under cl (*b*) will be entitled to demand possession of the temple properties from the defendant in the suit whose title to administer the trust has been negatived by

[1] Tricumdass v Khimji (1892) 16 Bom 626, Jan Ali v Ram Nath (1882) 8 Calc 32 Lutifunnissa v Naziran, (1885) 11 Calc, 33

[2] See *Report of Special Committee*

[3] Tl

16 Bom, 626

[4] Brojo Mohun Doss v Hurri lall (1880) 5 Calc, 700 Gajapati v Bhagavan, (1892) 15 Mad, 44

[5] Lakshmandas v Ganpatrav, (1884) 8 Bom, 365

[6] Jawahra v Akbar Husain, (1885) 7 All, 179

[7] Venkata v Subbarayadu, (1890) 13 Mad, 293

[8] Raghubar Dial v Kesho (1889) 11 All, 18 Syed Amin v Ibram, (1882) 4 Mad H C, 112, Sathappayyar v Periasami, (1891) 14 Mad, 1, p 14

[9] Vishvanath v Rambhat (1891) 15 Bom 148, Augustine v Medlycott, (1892) 15 Mad, 241 but see Tricumdas v Khimji, (1892) 16 Bom, 626

[10] Miya Vali v Bava Santi (1898) 22 Bom, 496

[11] Muhammad Abdullah v Kallu (1899) 21 All, 187

[12] See Lord Macnaghten in Chota Lal v Manohar G Ganbekar, (1899) 4 Calc W N, 23

[13] Srinivasa v Srinivasa, (1893) 16 Mad, 31, Srinivasa Swami v Ramanuja, (1899) 22 Mad, 117

[14] Shakaram Chand v Ghelabhai, (1895) 19 Bom, 34

[15] Damodharbhat v Bhogilal, (1900) 24 Bom, 45

the decree, and if such possession be not given, will be entitled to bring a suit to eject them from the temple and its endowments [1]

Religious Endowments Act, 1863 —The provisions of section 14 of this Act are expressly saved by sub section (2) By ss 14 15, 18, Act XX, 1863, any person interested in a religious establishment may, after sanction, sue the officers connected with it for breach of trust [2] But that Act only applies to special officers while filling their offices [3] On the one hand, the scope of the Act is not limited to cases in which the office is not hereditary, [4] on the other, it does not apply to a suit instituted by the managing committee against their manager, [5] nor to a suit by the members of a 'punch' to have certain dedicated property ascertained, [6] nor to a suit by an officer of a religious establishment for wrongful dismissal, [7] nor where all the persons interested sue, [8] nor to compel the heir of a late manager to make good out of the property inherited by him a sum misappropriated by his father [9] nor to recover the property of a temple from an ex trustee, [10] and is limited in its scope to suits charging misfeasance malversation, or neglect of duty [11] irrespective of any difference with regard to trustees whether hereditary or selected [12] A transferee of trust property under a transaction which amounts to a breach of trust on the part of the trustee of the institution cannot be proceeded against under the provisions of the Religious Endowments Act, 1863 A trustee of a public religious institution can be sued under the provisions of the Religious Endowments Act, 1863, notwithstanding the fact that the institution came into existence after Reg VII of 1817 was passed [13] A temple committee appointed under Act XX of 1863 may appoint new trustees when there is no hereditary trustee to add to the existing trustee but this power although discretionary must be exercised reasonably and in good faith and according to the principle which is applicable to public trusts embodied in s 49 of the Indian Trusts Act. If it is not so exercised the power may be controlled by a Civil Court of original jurisdiction [14] No suit to remove the trustees of a Hindu temple can be brought under Act XX of 1863, unless it be proved or admitted that the

[1] Netirama v Venkatacharulu (1903) 26 Mad 450 As to the claim of persons not a party on the record to execute a decree passed under this section, see Ragava v Rajaratnam, (1891) 14 Mad 57.

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[2] Lutifunnissa v Nazirun (1885) 11 Calc, 33, see also Balwant Rao v Puran Mal (1884) 6 All, 1, L R, 10 I A 90 or for misfeasance or neglect of duty Kuneez Fatima v Saheba Jan, (1867) 8 W R, 313

[3] Sabapathi v Subrya, (1878 81) 2 Mad, 58, and see Sathappayyar v Periasami, (1891) 14 Mad, 7 Protap Chandra v Brojonath, (1892) 19 Calc, 275

[4] Natesa v Ganapati, (1891) 14 Mad, 103

[5] Padmalav Ray v Ram Gopal (1882) 11 C L R, 333 9 Calc, 133

[6] Panchcowrie Mull v Chumroo Lall, (1878) 2 C L R, 121, 3 Calc, 563

[7] Syed Amin v Ibram, (1852) 4 Mad H C, 112

[8] Sathappayyar v Periasami, (1891) 14 Mad, 1

[9] Jeyangarulavaru v Durma Dossji, (1868 69) 4 Mad H C, 2

[10] Virasami Nayudu v Subba, (1883) 6 Mad, 54

[11] Agri Sharma v Vistnu, (1878 81) 3 Mad H C, 198, Mahalinga Rau v Vencoba, (1882) 4 Mad, 157, and see Natesa v Ganapati, (1891) 14 Mad, 103

[12] Fakurudin v Ackem Sahib (1878 81) 2 Mad, 197, otherwise if the suit is really one to be appointed manager, Lutifunnissa v Nazirun, (1885) 11 Calc, 33

[13] Sivayya v Rami Reddi, (1899) 22 Mad, 223

[14] Davud Saiba v Hussein Saiba, (1894) 17 Mad, 212

endowment was one which would have fallen under the provisions of Reg VII of 1817[1] The right to bring suits for the recovery of the property of a religious or charitable institution is vested in the trustee or manager of such institution[2] A suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple Where such a suit was so brought, the Court in second appeal allowed the plaint to be amended on certain conditions by substituting the name of the person alleged to be the manager of the temple, but without prejudice to any question which might subsequently be raised as to such person's *locus standi* in the suit[3] When the hereditary trustee of a temple died and application was made by the Collector as Agent of the Court of Wards in whom the management of the deceased's estates during the minority of the sons of the deceased had vested, to be appointed trustee on behalf of the sons, *held* that the case came within s 5 of Act XX of 1863 and

Other endowments —As to the procedure to be followed in suits in regard to endowments other than the kind referred to in this section and Act XX of 1863, see[6]

Costs —The Advocate General's costs come, as a rule, out of the trust fund[7] When a decree directed that the defendants should have their costs taxed as between attorney and client out of the charity funds, *held*, that when the taxing master decided that certain items allowed against the defendants should not come out of the charity funds, his decision could not be disturbed[8]

Court-fee —A suit to remove a manager in possession must be valued under section 7 of the Court Fees Act[9] A suit under s 14 of Act XX of 1863 against the Superintendent of a religious endowment for misfeasance is a suit which, for the purpose of payment of court fees, falls within art 17, cl (vi) of Schedule II of

account to be taken from the trustees and that the trustees may be compelled to refund moneys alleged to have been misappropriated by them, does not take the case out of the purview of art 17, cl vi, Sched II of the Court Fees Act, 1870, and render the plaintiffs liable to pay an *ad valorem* court fee on that part of their plaint[12]

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1 Muthu v Gangathara, (1894) 17 Mad, 95

2 Sankaramurti v Chidambara, (1894) 17 Mad, 143

3 Raghunathji v Shah Lal Chand, (1897) 19 All, 330

4 Somasundara v Vythilinga, (1896) 19 Mad, 285

Maharaj Siraju Haq v Imamuddin (1897) 19 All, 104

6 Rup Narain Singh v Junko Bye, (1878 79) 3 C L R, 112, Prosunno cowrie Mull v Chumroo Lall, (1878) 3 Calc., 563, 2 C L R, 121, Kaleo Churn v Golabi, (1878) 2 C L R, 128

7 Parmanandas v Venayek, (1883) 7 Bom, 19, L R, 9 I A 96

8 Advocate General of Bombay v Abdul Kadur, (1896) 20 Bom, 301

9 Sonachala v Manika, (1885) 8 Mad, 516

10 Muhamad Sirajul Haq v Imamuddin, (1897) 19 All., 104

11 Thakuri v. Bramha Narain, (1897) 19 All., 60

12 Girdhari Lal v Ram Lal, (1899) 21 All., 200.

Limitation —In a suit to follow money in the hands of a *dharmakarta*, s 10 of the Limitation Act applies,[1] in a suit to oust a *shebait*, art 120 applies[2] The *de jure* managers and trustees of a public charity losing their right by limitation to oust the *de facto* trustee does not confer on the latter immunity from suit on the part of the Advocate General or the temple[3] With every breach of a constructive trust, a fresh cause of action arises[4]

Revision—If the Judg sue under s 18 of Act XX of 622 (former Code)[5] But the presented in Court is a material irregularity and is liable to revision[6]

Scheme —In settling a scheme the Court should give due consideration to the established practice of the institution and the position of those connected with it[7]

Exercise of powers of Advocate General outside Presidency towns

93 The powers conferred by sections 91 and 92 on the Advocate General may, outside the Presidency towns, be with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf

Act XIV of 1882 section 539 This section applies to H C

The following notifications remain in force by virtue of the saving section of this Code

Notifications —The powers conferred by this section on the Advocate General are exercised—

(*a*) in Lower Burmah by the Government Advocate see Burmah Gazette, 1893 Pt I, p 99

(*b*) in Moulmein in respect of the trust for the maintenance of certain *pagodas* by the Deputy Commissioner see Burmah Gazette, 1889, Pt I p 221

(*c*) in Mandalay, by the Deputy Commissioner see Burmah Gazette, 1890, Pt I p 456

(*d*) in the Central Provinces, by the Secretary to the Chief Commissioner, see Central Provinces List of Local Rules and Orders, ed 1896 p 157

(*e*) in the Madras Presidency by all Collectors, except the Collector of Madras see Madras List of Local Rules and Order, ed 1898, Vol I, p 197

(*f*) in the North Western Provinces and Oudh by the Legal Remembrancer, see North Western Province, and Oudh List of Local Rules and Orders, ed, 1894, p 114

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[1] Sethu *v* Subramanya (1888) 11 Mad 274

[2] Jagan Nath *v* Birbhadra (1892) 19 Calc, 776

[3] Lakshmandas *v* Jugal Kishore (1898) 22 Bom 216

[4] Jugal Kishore *v* Lakshmandas (1899) 23 Bom 659 Jurisdiction —Compare Protap Chandra *v* Brojonath, (1892) 19 Calc 275, and Augustine *v* Medlycott (1892) 15 Mad 241

[5] Venkateswara *in re*, (1887) 10 Mad 98

[6] Amdoo Miyan *v* Muhammad Davud Khan, (1901) 24 Mad, 685

[7] Balderpari *v* Gopaldeo (1900) 8 Bom, L R, 700

PART VI.

SUPPLEMENTAL PROCEEDINGS

Supplemental proceedings.

94 In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ,

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ,

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ,

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

This is a general provision empowering the Courts to make rules to regulate their procedure, and of itself effects nothing

If it is [illegible] be made hereunder Injunctions [illegible] XXXIX , receivers, in Order XL [illegible] attachment bef[illegible] Judgment [illegible] arrested under sect 6 of the subject See Ann Prac (1908) are dealt with in R S O 44

Compensation for obtaining arrest attachment or injunction on insufficient grounds

95 (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction

Act XIV of 1882 sects 491 and 497 This section applies to H C and except as to injunctions to Prov S C C

Arrest —If a defendant is arrested he may apply under this section, although he has not been summoned [1]

Compensation can only be granted by the Court which disposes of the case [2] The defendant is not bound to apply for redress [3] and by omitting to do so he does not lose his right to bring a regular suit [4] but if he applies for compensation, any award that may be passed will bar a regular suit [5] Where a regular suit is instituted, the plaintiff must prove that the process was sued out maliciously and without reasonable and probable cause [6] and the presumption is that the process issued regularly, although the original suit was dismissed [7]

Compensation may be awarded for excessive attachment notwithstanding that the plaintiff may be successful [8]

A civil suit will lie for property which was attached but made away with by the plaintiff in collusion with the Court peon without first instituting a criminal case [9]

In a summary suit, if a defendant has been arrested before judgment and claims compensation for such arrest he is entitled to apply for leave to defend the suit and if a *prima facie* case is made out, leave to defend should be given Under the Civil Procedure Code, a cross claim against a defendant cannot in ordinary cases be set up as a defence except when it arises out of the very transaction sued upon and is in the nature of a set off, but the special cross claim provided by this section, *viz*, a claim for compensation for arrest on insufficient grounds may be taken into account in any suit, and the amount awarded as

[1] Syed Ali v Adib, (1891) 15 Bom 160

[2] Huro Soonduree v Bungee Mohun, (1865) 3 W R, Mis, 28

[3] Goutiere v Charriol, (1869) 1 All H C, 91

[4] Daniel v Mohun Bibee, (1866) 1 Agra, 104, Wilson v Kanhya (1869) 11 W R, 143

[5] Gobindhun v Banee Chunder, (1874) 21 W R, 375.

[6] Goutiere v Robert (1870) 2 All H. C 303, Sheoraj Singh v Dwarka Das (1872) 4 All H C, 42

[7] Dhurmo Narain v Sreemutty Dossee, (1872) 18 W R, 440

[8] Mahomed Rezaooddeen v Hossein Buksh Khan, (1866) 6 W R, Mis, 24

[9] Choitunno Paramanick v Zumeerooddee, (1872) 18 W R 27

compensation be awarded in the decree and thus *pro tanto* be a defence to the plaintiff's claim in the suit [1]

Small Cause Court — A Court of Small Causes has jurisdiction to award damages under this section [2]

Limitation —For the period of limitation in a suit for compensation for attachment before judgment, see *Manikkaman v Arsilan* [3]

Injunction — A defendant cannot get compensation for the issue of a temporary injunction except under the provisions of this section [4] *In this case* Kastur attached a house in execution of a decree against Vanmali Varajlal sued to have it declared that the house could not be sold in execution *of this* decree This suit was dismissed and he appealed Pending the appeal he obtained a temporary injunction staying the sale on his giving *security for* interest at 6 p c on the value of the house On his appeal being dis

which Varajlal had given *security*

He had his remedy under the

which was obtainable *on applica*

ourt which issued the injunction

Appeal —An appeal from an order under this section is expressly granted by sect 104 *post*

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[1] Roukt v Fetterk (1894) 18 Bom 717

[2] Ibrahi Rowthen v Sangaram Shetty, (1903) 26 Mad , 504

[3] Manikkaman v Arsilan (1895) 19 Mad 80

[4] Varajlal v Kastur, (1896) 22 Bom 42.

PART VII.

APPEALS

APPEALS FROM ORIGINAL DECREES

Appeal from original decree

96 (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree, passed by any Court, exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court

(2) An appeal may lie from an original decree passed *ex parte*

(3) No appeal shall lie from a decree passed by the Court with the consent of parties

Act XIV of 1882, s 540 This section applies to H C in ordinary civil suits and also in its Vice Admiralty jurisdiction [1]

The most important alteration effected by this Code in the existing law relating to appeals is the granting of a right of appeal from preliminary decrees, the exercise of which is rendered imperative by section 97 *post*

Consent decree —An appeal is expressly prohibited by this section, thus giving legislative sanction to the judicial views already expressed

Costs —See notes to section 35 *ante*, *vide*, Appeal for costs, p 163

Discretion of the Court —Section 35 of this Code gives a very wide discretion in the determination of questions as to costs Following the decisions of the English Courts, and of the Courts in India under Act XIV of 1882, it seems that an appeal will lie without leave from an Order as to costs where the discretion of the lower Court has been exercised on a wrong principle or on a mistake as to facts, or where the judge has decided on grounds not open to him [2] In practice it will probably be found safer to apply for leave even in these cases

Costs only —Where the order or decree is otherwise appealable, an appeal also lies as to the part relating to costs [3]

Who may appeal —Any party to a suit in which a decree is passed, may if dissatisfied with it, appeal from it [4] The question whether a party is aggrieved

[1] 'Champion," in the matter of, (1890) 17 Calc, 66, "Fanni Skolfield," in the matter of, 17 Calc, 337 For restrictions in appeals in suits for recovery of rent in Bengal, see Act VIII of 1885, s 153, and schedule.

[2] See cases cited under section 35, *vide*, Appeal for costs, p 163 *ante*

[3] Lalkissen Das v Luchmeeput, (1882) 8 Calc, 91

[4]

plaintiff or defendant
of the parties to the
and when the right
are implicitly recog
claim either way, the

by a decree is one of fact to be determined in each case on its peculiar circumstances, and a defendant may have a right of appeal notwithstanding that the suit has been dismissed as against him[1] but he must shew that he is aggrieved[2] So, apart from cases on estoppel, only parties to suits at the time the decree is made or their representatives or assigns when brought on the record or an auction purchaser in an appeal from an order passed in execution, have the right of appeal under this section[3]

First assignees of a debt can appeal in a suit brought by persons alleging themselves to be second assignees though no decree has been passed against them by name if the decree passed in favour of the plaintiff has implied a finding that the first assignment has become void[4]

The assignee of a party cannot appeal without an order of Court allowing his name to be entered on the record See REPRESENTATIVES note under section 47 *ante* So where a defendant sold the property in suit after a decree was passed against him in the appellate Court, it was held that his assignee

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Expressly provided —S 4) of the Burma Courts Act precludes an appeal if the suit is not one which has an amount or value capable of being estimated in money[8]

To what Court an appeal lies —See s 21, Act XII of 1887

Value —The subject matter of an appeal should be valued for the purpose of jurisdiction according to the law in force at the date of the appeal and not of the suit which has led to it[10] and for the purpose of determining the forum of appeal the rule is that where a plaintiff definitely fixes a certain sum as the amount of his claim, that sum should be considered as the value of the original suit but when he fixes a sum only approximately or tentatively and prays that

defendants are entitled to appeal from it —Behari Bhagat v Begum Bibi, (1880 I) 3 All 75 So when a suit for redemption was dismissed on the ground that the mortgage deed had not been satisfied by a decree which declared the plaintiffs right to redeem, it was held that the defendants who denied their title were entitled to appeal—Ram Gholam v Sheo Tahal (1876 78) 1 All 266 It is not necessary to appeal from findings on issues which do not arise in the case Ghela v Sankalchand, (1894) 18 Bom, 597

[1] Krishna Chandra v Mohesh Chandra Saha, (1905) 9 C W N, 584 and cases there reviewed

[2] Mohandee v Nazirun, (1881) 6 Calc, 19 Muttakumurappa v Arumuga, (1884) 7 Mad, 145, see Ram Pershad v Jagannath, (1903) 30 Calc, 134

[3] See Woodroffe J in (1905) 9 C W N, at p 588 (supra) Caemmerer v Birch, (1876 8) 1 Mad H C, 8, Juggo Lal v Bhikan Lal, (1866) 5 W R, 133

[4] Jamna Das v Udey Ram (1899) 21 All, 117

[5] Moseshwar v Kushabas, (1878) 2 Bom, 248

[6] Dhunnoo v Sunnoo, (1871) 15 W R, 106

[7] Monerooddeen v Parbutty Churn, (1871) 15 W R, 121

[8] Golam Rahman, v Fatima, (1886) 13 Calc 232, Mulla Adjim petitioner, (1887) 14 Calc, 351 Mowla Newas v Sajidunnissa, (1891) 18 Calc., 378 But see Lower Burmah Courts Act, 1900, s 28

[9] Ram Koomar v Sonatun (1879) 3 C L R 23 see, however, Jardine v Tarini Mohan Sen (1871) 8 B L R, App, 44

[10] Muttammal v Chinnana, (1882) 4 Mad, 220

the amount of his claim may be ascertained in the course of the suit then the amount found by the lower Court to be due to him must be regarded as the value of the suit [1] and in the latter case if the suit be dismissed the value of the suit for the purpose of appeal is what is stated in the plaint [2] The Court to which the appeal lies depends on the actual value of the subject matter in dispute in the original case out of which the contest may have arisen,[3] as assigned by the plaintiff [4] So also in Madras the appeal is governed, not by the value of the proximate subject matter in dispute but by the value of the subject matter in the original suit [5] *When a plaintiff in a suit under s 93 of* the N W P Rent Act has valued his suit at Rs 46 3 he cannot by subsequently alleging a greatly enhanced value obtain an appeal which would not have lain on the valuation stated in the plaint [6] When a landlord brings a suit for rent under ss 37 and 39 Act I of 1879 B C against a number of tenants collectively if the aggregate amount sued for exceeds Rs 100 the appeal lies to the Judicial Commissioner The decision of the first Court, on the question of valuation is not final for the purpose of determining jurisdiction [8] Where an appeal is preferred on the ground that if the suit had been properly valued the it the appellate Court must has been valued at Rs 150 the *District Court and not to the* High Court [9] S 12 clause (1) of the Court Fees Act is no bar to an appeal when the question to be decided by the lower Court is merely the class of the suit in order to ascertain under what schedule of the Act it must be taken to fall for the purpose of fixing the Court fee payable on the plaint or memorandum of appeal [10]

Limitation of right—The power to appeal is limited by the relations between the different parties Thus a defendant whether interested or *pro forma* only, cannot appeal against a co defendant[11] unless the lower Court has dealt with the case as raising a question between the defendants[12] but if he does and the decree is against him he is estopped [13]

Agreement not to appeal—If appellant agrees not to appeal, no appeal will

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[1] Gulab Khan v Abdul (1903 4) 8 Calc W N 233.

[2] Nagendra Nath v Russik Chandra (1901 2) 6 Calc W N 346

[3] Duli Chand in the matter of (1871 2) 9 B L R 190 (1872) 18 W R, 261 Act XII of 1887 s. 21 Bodya Nath v M khan (1890) 17 Calc, 680 Rajasangji Shivangji v Gulam Rasul (1871 2) 9 Bom H C 286 Aukhi Chunder v Moheenee Mohun (18 9) 4 C L R, 491

[4] Mahabir Singh v Behari (1891) 13 All, 320

[5] Muthu ami Pillai v Muthu Chidambara (1873 4) 7 Mad H C, 306 Act III, 1873 s 13.

[6] R[illegible] in a suit for 417 Kartic [illegible]Khan (1890) Ramayya v [illegible]92) 15 Mad r account and 675 and in

[7] Prag Nath v Mura Munda (189) 24 Calc 249 1 Calc W N 181

[8] Brojo Coomar v Ebhai Chunder (1878 9) 3 C L R 79

[9] Amba v. Pranjivandas Dullabhram (189) 19 Bom, 198

[10] Studd v Mati Mal to (1901) 28 Calc 334 In a Redemption Suit.—See Umar Khan v Mahomed Khan (1886) 10 Bom 41 Iridhu Narain v Sita Ram, (1891) 13 All 94 Reference (1891) 14 Mad. 480

Cudadhur Banerjee v Mun Mohun ee (186) 7 W R 366

[12] Soiru Padmanath v Narayanrao (1894) 18 Bom 520

[13] Kashee Chunder Roy v Doorga (1869) 11 W R., 410.

lie[1] and
will lie.[2]
sioner an
the decree passed in accordance with the Commissioner's report[3]

Respondent—A cannot appeal so as to affect B's rights under the decree, unless he makes B a respondent[4]

Stamp—An appellate Court has no power to receive an *instrument*, on payment of the proper stamp and penalty, unless they were tendered in the lower Court.[5]

High
C tation
A ng an
appeal is in itself no ground of interference by the High Court[6]

When an appeal lies—Appeal must be given by Statute *or some* equivalent authority[7] No right of appeal can be given except by express words.[8] *They lie only from decrees or from amended decrees*[9] *and not from the judgment*[10]

This section gives an appeal from all original *decrees* for the definition of which word see section 3 *ante* it expressly includes preliminary as well as final *decrees*[11] Appeals from orders are dealt with in section 104 *post*

[1] Ameer Ali v Inderjeet Singh, (1871 2) 14 Moo I A, 203, Anant Das v. Ashburner, (1876) 1 All, 267, Protap Chunder v Arratoon, (1881 2) 10 C L R, 443, (1882) 8 Calc, 455

[2] Jati Ram v Dass Ram, (1878 9) 3 C L R, 574.

[3] Bahir Das v Nobin Chandra, (1901 2) 6 Calc W N, 121

[4] Ram Mohun Dey, in the matter of, (1873) 20 W R, 149

[5] Champabaty v Jibun, (1879) 4 Calc, 213

[6]

[7] Mad, 26; Ladh v

[8] Narayan Ballal v Secretary of State, (1896) 20 Bom, 803

[9] Per Oldfield J, in Raghunath v Raj Kumar, (1885) 7 All, 276, Surta v Ganga, (1885) 7 All, 411.

[10] , 206, Anusuyabai v Sakharam,

[11] 382 may be noted in addition to those

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execution, discharge or satisfaction of the decree—Murlidhar v Anand Rao, (1901) 25 Bom
purchaser and the
6 Calc W N, 57
assessment of mesi
Reid, (1901 2) 6 C.

Appeal from final decree where no appeal from preliminary decree

97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

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for which mesne profits are recoverable—Bhup Indar v Bijai Bahadur, (1900) 5 Calc W N 73, or an order dismissing objections to the execution of a decree for default—Lal Narain v Rahuddin (1901) 28 Calc, 81 or an order disallowing a judgment debtor's objection as to the grossly inadequate price stated in the sale proclamation —Ganga Prosad v Rajcoomar (1903) 30 Calc 617 or that the valuation as stated in the sale proclamation is incorrect —Parmessur Prosad v Sham Kissen (1903 4) 8 Calc W N, 257, or from a decree in a suit under s 77 of the Registration Act —Wishwambhar v Prabhakar (1884) 8 Bom 269 An appeal lies to the District Court from an order of an inferior Court under the Succession Certificate Act—Subba Pro v Palamardi (1894) 17 Mad 167 from an order of the District Judge refusing to grant a certificate of heirship under Reg VIII of 1827—Javer Mal v Nazir District Court Poona (1894) 18 Bom 748 Rangubai v Abaji, (1895) 19 Bom 399 from the order or decision of a Collector or Assistant Collector on a questi[illegible]
the N W P Revenue
(1892) 14 All 500
141 Raja Singh v Sul
5 All 09 from a decision in a suit under s 93 Act XII of 1881 when the rent payable by the tenant has been a matter in issue and has been deter

104 of the Bengal Tenancy Act—Durga Churn v Basir Mandal (1901 2) 6 Calc W N 238 from an order under s 58 of the Indian Companies Act, although no issue has been directed upon a question of title—Amrita v Shri h
s to the
onment
(1896)
ie order

, or an order
rred by the
W N, 190,
the property
of a lunatic under Act XXXV of 1858—Dinesh Chunder v Soudamini, (1898) 4 Calc W N, 526

No

Ali (1891) 18 Calc 352, or granting leave to institute a suit under that section—Protap Chandra v Brojonath, (1892) 19 Calc, 275, see also Dulrus

This section gives full effect to the new distinction between preliminary and final decrees For the definition of preliminary decree see, section 2 (2) *ante* and notes thereto

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Bajoy *v.* Abdoor Rahman (1874) 21 W R 368 or from an order passed under s 5 of the Court Fees Act—Balkaran *v.* Gobind Nath (1890) 12 All, 129, or fixing the a[illegible] M[illegible]dhav Rao *v.* Collecto[illegible] Rawa, (1878) 2 Bom [illegible] L R App 12 14 W [illegible] R. App 11, 14 W R [illegible] and s 12 of the Court fees Act VII of 1870, or from decrees or orders made under ss 73 [illegible] and 15 of Act XX of 1866—Subullay *v.* Balaram (1886) 12 Calc 511 [illegible] or from an order in an account suit passed before final decree varying the report of the Commissioner appointed to take accounts—[illegible] *v.* Dalabhai (1900) 24 Bom, 302, or from an order refusing [illegible] under s 18 Act XX of 1863 or from an order under s 84 of the Bengal Tenancy Act—[illegible] *v.* Baroda, (1892) 19 Calc 485 [illegible] (1891) 18 Calc 271, or from the decision of a special Judge under s 104 cl (2) of that Act—Kirat Narain *v.* Palakdhari (1890) 17 [illegible] 32 or from an order under s. 91 of that Act—[illegible] Lal (1897-8) 2 Calc W N 351 or from an order of remand under s 1[illegible]3 of that Act when the amount in dispute is less than Rs 100 and such order has not determined any of the questions specified in that section—[illegible] Chunder *v.* Ce[illegible] (1899-00) 4 Calc W N, 44 or from an order under s 1[illegible]3 of that Act setting aside a sale—Roghu Singh *v.* Misri Singh (1894) 21 Calc 8[illegible] Harabandhu *v.* Harish Chandra, (1898-9) 3 Cal W N 184 or from an order under s 174 of that Act—Kishori M[illegible] *v.* Saradamoni (1896-7) 1 Calc W N 30 Subh Narain *v.* Goroke

XXVII of 1860—Nanuk Pershad *v.* Lalla Nitya Lall, (1881) 6 Calc, 40, or

against the final decree—Joggodishury Debea *v* Kailash Chandra Lahiri, (1897) 24 Calc, 725, 1 Calc W. N, 374 No appeal lies against an order amending a sale certificate on review—Boojha Roy *v.* Ram Kumar, (1898 9) 3 Calc W N, 374, or from an order refusing to amend—Saddo Kunwar *v.* Bansi Dhar, (1901) 23 All., 476, or from an order amending a decree not in

Appeal from final decree where no appeal from preliminary decree

97 Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree

the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it

Act XIV of 1882 sect 595 This applies to H C

Court —The only Bench that can hear the case is the Judges who differed and the third Judge [1]

Application of section —The provisions of this section extend to miscellaneous proceedings and supersede the Letters Patent [2] they also extend to proceedings in execution [3] but not to reviews [4] and where the Judges differed on a preliminary question, namely as to whether the appeal was barred it was held that the result was governed by the Charter, and not by the corresponding section of Act XIV of 1882 [5]

Reference —If the Judges differ on a question of fact only, there is no power to refer [6] If the Judges deliver judgments without any reservation, they cannot afterwards refer [7] and the judgment of the lower Court is affirmed [8]

Appeal —There is an appeal under the Letters Patent [9] So also if they differ as to the awarding of costs [10]

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction

99 No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or of any error, defect or irregularity in any proceeding in the suit not affecting the merits of the case or the jurisdiction of the Court

Act XIV of 1882, sect 578 This section applies to H C

It has been extended in its application by the insertion of the words "misjoinder of parties or causes of action Misjoinder no longer [11] makes the suit bad and the decree therein reversible unless the merits or the jurisdiction are affected if any party to the suit has been prejudiced by such misjoinder that fact will suffice to take the case out of this section For instance, the misjoinder *of six defendants in one suit whose contracts are individual and separate,* affects the merits of each man's case [12]

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[1] Rohilkhand and Kumaon Bank *v* Row (1884) 6 All 468 and see Sulbaya *v* Krishna (1891) 14 Mad 186 p 191 In Bombay, the third Judge hears the case alone—Nagu *v* Salu (1891) 15 Bom , 424

[2] Appaji *v* Shivlal (1879) 3 Bom , 204

[3] Balaji *v* Manager of Estate of Mohanlal (1881) 5 Bom , 680

[4] Hurbans Sahay *v* Thakoor Pershad, (1884) 10 Calc , 108

[5] Husaini *v* Collector of Mozaffarnagar, (1889) 11 All , 176 And see Lachman Singh *v* Ram Lagan (1904) 26 All , 10

[6] This was the previous law see Gridharji *v* Romanlalji (1890) 17 Calc , 1, p 10.

[7] Lal Singh *v* Ghansham (1887) 9 All , 625

[8] Devachand *v* Hirachand (1889) 13 Bom , 449 Keshav Pandurang *v* Vinayak Hari, (1894) 18 Bom 348

[9] R [illegible] 89) 13 [illegible] urang (1902)

[10] Mohendro Chunder *v* Ashutosh Ganguli, (1893) 20 Calc , 762.

[11] Varajlal *v* Ramlal (1902) 26 Bom , 259 Muthappa *v* Muthu Palani (1904) 27 Mad , 80

[12] Namasivaya *v* Kadir Ammal, (1894) 17 Mad , 168

XIV of 1882, it was *held* that
ich a District Court reversed
for a revised finding on the
merits[1] Where an application to allow the execution proceedings to be re-opened on the ground that the decree holder had acted under a mistake of calculation
', *held*, that the order could not,
has been transferred to another
ition after substitution of the name of the transferee, the order is passed without jurisdiction and can be set aside on appeal notwithstanding this provision[3]

Valuation —As to the modification of this section when objection is taken on appeal that the suit or appeal is not properly valued, see Act VII of 1887 s 11 which is as follows—

"11 (1) Notwithstanding anything in section 578 (see sec 158, *post*) of the, Code of Civil Procedure an objection that by reason of the over valuation or under valuation of a suit or appeal a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless—

"Procedure where objection is taken on appeal or revision that a suit or appeal was not properly valued for jurisdictional purposes

"(*a*) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or

"(*b*) the appellate Court is satisfied, for reasons to be recorded by it in writing that the suit or appeal was over valued, or under-valued, and that the over valuation or under valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits

"(2) If the objection was taken in the manner mentioned in clause (*a*) of sub section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (*b*) of that sub section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court

"(3) If the objection was taken in that manner and the appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals, but if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal

Not affecting the jurisdiction of the Court —This means not affecting the competency of the Court to try[5]

Application of the section —This section only applies to mistakes and irregularities subsequently committed in a suit which has been instituted in such a way as to give the Court jurisdiction to try it,[6] it does not apply where the proceedings and the decree passed by a lower Court are without jurisdiction[7]

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[1] Mallikarjuna v Pathaneni, (1896) 19 Mad, 479

[2] Nilratan v Ram Ratton, (1880) 5 Calc W N 627

[3] Amarchandra Banerjee v Guru Prosunno Mukerjee, (1900) 27 Calc., 488

[4] Krishnasami v Kana Kasabai, (1891) 14 Mad, 183

[5] Matra Mondal v Hari Mohun, (1890) 17 Calc, 155

[6] Varajlal v Ramdat, (1902) 26 Bom, 259

[7] Beeju Kooer v Damodur, (1883) 5 All, H C, 55.

Not reversed —No decree can be reversed or case remanded for any irregularity, error or defect such as trying ten suits together[1] nor for error in valuing a suit[2] unless the proper valuation affects the jurisdiction[3] such as where a Subordinate Judge tries a case cognizable by a Munsif[4] or one cognizable by the Small Cause Court[5] nor for admitting a document not properly stamped,[6] unless it be the plaint, when the suit must be dismissed under s 12 Act VI of 1870[7] nor for omission to give detailed examination of the evidence[8] nor for recording evidence in language other than that of the Court,[9] nor for the exclusion of evidence unless the appellate Court thinks it would affect the decision[10] nor because the lower Court omitted to give reasons for its decision in regular appeal[11] or in second appeal because the plaint was indistinct[12] nor because the Judge, instead of dismissing a suit under Act VIII of 1859 s 15 changed it into a regular suit on payment of the proper stamp[13] nor because the Judge has wrongly exercised the powers given him by s 47 of Act I of 1877[14] nor because the wrong side began[15] nor because the Judge expressed himself wrongly in the judgment, if the decree is correct[16] nor for applying for execution against a [illegible] he Court to which a [illegible] e Court which passed [illegible] ffs who were found to [illegible] declared invalid has

1 Anundmoyee Chowdhrain v Sheeb Chunder Marsh, (1862) 455, Param v Achal (1882) 4 All 289

2 Ramessur Dyal v Raj Kishore (1870) 13 W R 325 Wajid Ali v Hanuman Prosad (1869-70) 4 B L R A C 139 12 W R 484 Showdamini v Ram Kudri (1867) 8 W R 357 Sulah Roy v Bulleo (1875) 24 W R, 225, Mahomed Shah v Lall Mahomed (1871) 15 W R 179, Param v Achal, (1882 4 All 289

3 Huree Pandey v Bassoo (1869) 11 W R 257 Augopuri v Meah Bibi, (1868) 10 W R 207 Mewa Lal v Beharee Lal (1870) 14 W R 195

4 Nidhi Lal v Mazhar (1885) 7 All, 230, Matia Mondal v Hari Mohun, (1890) 17 Calc 155

5 Hamidunnissa v Gopal Chandra Malakar, (1897) 24 Calc, 661

6 D[illegible] [illegible] m, (1880) [illegible] tinath v [illegible], (1871) 7 [illegible] C, 126 [illegible] 235, 12 W R 47 as to the old law, compare Mautappa Nadgowda v Baswantrao Nadgowda 14 Moo I A 59 Safdar Ali v Lachman Das (1879) 2 All, at p 559, Chedi Lal v Kirath Chand (1879) 2 All 682, Adinarayana v Minchin, (1878) 3 Mad H C, 297

7 Shama Soondary v Hurro Soondary (1881) 7 Calc, 348 Kammathi v Kunhamed (1892) 15 Mad 228, see, however, Mehdi Husein v Madun Bakhsh (1879) 2 All 859

8 Noor Mahomed v Zuhoor Ali (1869) 11 W R, 34

9 Ratan Lal v Narshi (1907) 34 Calc 396, 11 Calc W N, 826

10 DeSouza v Pestanji (1884) 8 Bom 408 and see Surjyamoni v Kalikanta, (1901) 28 Calc, 37 p 52, 5 Calc W N 195

11 Katchekaleyana v Kachivijaya (1868) 12 Moo I A, 502, 2 B L R, P C, 72, 11 W R P C, 33

12 Gour Surun Doss v Kanhya Singh (1865) 2 W R, 237

13 Doorga Nath v Rookminee Kant, (1875) 24 W R, 167

14 Mahammed v Khuda Bakhsh, (1887) 9 All, 622

15 Makund v Bahori Lal, (1881) 3 All, 824

16 Ram Chunder v Raw Jeebun, (1870) 14 W R, 141.

17 Sham Lal Pal v Modhu Sudan Sircar, (1895) 22 Calc, 558

18 East Indian Railway v Jordan, (1869) 4 B L R, O C, 97; 14 W R, O C, 11

s based not on it, but on other on evidence taken by another officer d[3] The omission of a Collector to atter of the plaintiffs in the suit is a

a commission for the examina not have been believed canno affected the merits[5] Where nesses had been irregularly Act XIV of 1882 would apply if the irregularity in refusing the application did not affect the merits[6] The omission to make an application for reference to arbitration in writing is a mere irregularity, which can be cured under this section[7] A defect in the signature of the plaint or the absence of signature, when it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit and is not a ground for interference in appeal[8]

The omission of any formal order appointing a mother as guardian *ad litem* of a minor defendant in a suit is if the minor is not prejudiced hereby at most an irregularity of the nature contemplated by this section[9]

Sunday —The disposal of a suit on Sunday is covered by this section[10]

This section is applicable in curing the defect of an erroneous order of remand, if it does not affect the merits of the case[11]

Discretion — And where the relief asked for is in the discretion of the Court by a declaratory decree the Court of appeal should not set aside the decree on an objection not going to the merits and not raised in the first Court[12]

Form of suit — Where a corporate body was sued not in its corporate capacity, and a decree was given not against it, but against an agent the error was held to affect the merits of the case,[13] and where a person sued on behalf of another and the objection was raised in the first Court, the suit was dismissed on appeal And where plaintiff sued without authority from his principal, and no objection was made in the first Court, it was held that the objection could be raised in appeal, or in special appeal, and that the defect could not be cured by the production of a proper power in the special appeal,[14] but where it was

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[1] Girdhar Nagjishet v Ganpat Moroba, (1874) 11 Bom H C, 135

[2] Womes Chunder v Chundee Churn (1881) 7 Calc 293 see also Kenaram v Goopeenath, (1868) 10 W R, 130

[3] Naranbhai Vrijbhukandas v Naroshankar, (1867) 4 Bom H C, A C J, 98

[4] Sajedur Raja v Gour Mohun Das, (1897) 24 Calc, 418

[5] Akikunnissa v Rup Lal Das, (1898) 25 Calc 807, L R, 25 I A 117 (1898) 2 Calc W N, 566 But see Surjyamoni Dasi v Kali Kant Das (1901) 28 Calc, p 52

[6] Bhagwat Das v Debidin (1894) 16 All, 218

[7] Shama Sundram v Abdul Latif, (1899) 4 Calc W N, 92, 27 Calc, 61

[8] Basdeo v Smidt (1900) 22 All, 55, followed in, Nasirunnissa v Ghafuruddin (1906) 28 All, 244 As to defective verification, see Rajit Ram v Katesar, (1896) 18 All, 396 And see Rakhal v Secretary of State, (1906) 10 A W N., 841

[9] Walian v Banke Behari (1903) 7 Calc W N, 774

[10] Shioram v Thakur Prasad, (1907) 29 All, 562, 11 A W N, 168

[11] Mohesh Chander Das v Jamiruddin Mollah, (1901) 5 Calc W N, 509, 28 Calc, 324

[12] Sant Kumar v Deo Saran (1886) 8 All 365

[13] Nubeen Chunder Paul v Stephenson, (1871) 15 W R., 534

[14] Shivram Vithal v Bhagirthibai, (1869) 6 Bom, H C, A C J, 20

objected in appeal that the plaintiff's next friend had not been properly appointed the objection was disallowed [1]

When a suit is set aside on the ground that it was of a value beyond the jurisdiction of the first Court, the plaint should be returned in order to be presented in the proper Court [2]

APPEALS FROM APPELLATE DECREES

100 (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely

Second appeal

(*a*) the decision being contrary to law[3] or to some usage having the force of law,

(*b*) the decision having failed to determine some material issue of law or usage having the force of law,

(*c*) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits

(2) An appeal may lie under this section from an appellate decree passed ex parte

Act XIV of 1882 sect 584 This section applies to H C [4]

Save otherwise provided – The word "expressly" has been inserted in the re draft of sect 584 of Act XIV of 1882, and it is made clear that no Rules can be made restricting second appeals A special appeal lies from a decree under s 39 of the Land Acquisition Act,[5] and from the decision of a Political Agent in

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313 ... ,

2 Edoo v Hefazut Hossein, (1870) 13 W R 358, Bhadeswar v Gauri Kant, (1882) 8 Calc, 834, Ram Gutty v Goonomonee, (1869) 11 W R, 177

3 The word 'specified' has been omitted as redundant See Nirath Singh v Bhikhi Singh (1885) 7 All, 653, Ram Gopal v Shamskhaton (1893) 20 Calc, 93, L R, 19 I A, 228

4 In regard to the Andaman and Nicobar Islands, see Reg I of 1884, s 4, and to the Sonthal Pergunnahs see Sarbojit v Gonesh, (1884) 10 Calc, 761 The last paragraph has been inserted by Act VII of 1888, s. 54

5 Atri Bai v Arno Pocrns, (1883) 12 C L R, 409, (1883) 9 Calc, 838, Secretary of State v. Sham Bahadoor, (1884) 10 Calc, 769

...on of a District Court under s 10 ... of the District Court on appeal ... Gujrat Talukdars Act (Bombay Act VI of 1888)[3]—from the judgment of the Judicial Commissioner deciding on appeal the right of an intervenor to collect rent under s 87 of Act I of 1874 (B C)[4]

Rent suits [5]—Where the auction purchaser is a *benamidar* for the judgment debtor in an application to set aside a sale under s 173 of the Bengal Tenancy Act, and s 311 of the old Code a second appeal lies to the High Court from ... the decree of a special Judge ... nt of rents [7] or from the ... 104 of this Act [8] or from ... n the ground that no appeal lies to him in a case of a boundary dispute which has been tried and decided by a Settlement Officer under Part V of the Bengal Survey Act V of 1875 B C),[9] but a second appeal lies from his decision with regard to the prevailing standard of measurement, area of lands in the possession of tenants, and the liability of tenants to pay rents for excess lands [10]

... application to deposit landlord s ... and for confirmation of the sale ... m the decision of a District Judge in a suit for arrears of a rent under Act X of 1859 and tried by a Deputy Collector [12] from a decision of a special Judge reversing or affirming a decision of a Settlement Officer who decided under s 106 Act VIII of 1885 what was the rent payable by the plaintiff it not being a decision settling the rent under s 109A of the Act [13]

Chief Court of the Punjab—An appeal from an appellate Court to the Chief Court is not limited as such appeals are under this section, but evidence may be dealt with, and questions of fact are open for decision [14] See also section 4 *ante*

Suits under the Chota Nagpore Landlord and Tenant Act No second appeal lay to the High Court in a suit for arrears of rent arising under Act I of 1879 B C [15] This Act has now been amended by Act V of 1903 B C, sec 44 giving a second appeal from any appellate decree passed by the Judicial Commissioner under this Act There is no second appeal, however, from an order in execution [16]

Order under the Succession Certificate Act VII of 1889—There is no second appeal from an order under the Succession Certificate Act [17]

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1 Nilowa v Lakhappa (1869) 6 Bom H C A C J 73
2 Kamaraju v Secretary of State (1888) 11 Mad 309
3 Jamsang Devabhai v Gojabhai Kalabhai (1892) 16 Bom 408
4 Lall Bhim Singh v Guman Gunjhu (1897) 1 Calc W N, 341
5 As regards Bengal see Act VIII of 1885 s 153 and Prasanna Kumari v Srinath Dass (1888) 15 Calc, 231, Mohesh Chunder v Umatara (1889) 16 Calc, 638
6 Chand Monee v Santo Monee (1897) 24 Calc, 707 1 Calc W N, 534
7 Shewbarat v Nirpal (1889) 16 Calc, 596
8 Achha Mia v Durga Charn Law, (1898) 25 Calc, 146 (1898) 2 Calc W. N, 137, followed in Rameswar v Bhooneswar (1906) 4 Calc L J 138
9 Irshad Ali v Kanta Pershad (1894) 21 Calc, 935
10 ...
11 ... N 190
12 ... (1900 1) 5 Calc W N, 279
13 ... alc, 380
14 ...
15 Khedon Mohat v Budhun Mahota, (1900) 4 Calc W N, 333, (1900) 27 Calc, 508
16 Iswar Lal v Jagoo Sahu (1905) 33 Calc 378, 10 Calc W N, 284
17 Subba Rao v Palnandi Pillai, (1894) 17 Mad, 167

May possibly have produced —The word possibly was introduced into Act XIV of 1882 in consequence of a decision[1] holding that 'may have produced' means 'may not improbably have produced' and not 'may by some possibility have produced'

Decision —By the word decision is meant the decree and judgment taken together, and not simply the decree unexplained by the judgment [2]

Practice —The jurisdiction of the Court in special appeal is confined to the determination of such matters of law as may arise on the special appeal [3] It cannot decide facts, even with the consent of parties [4] nor draw any inference of fact from the evidence in the case [5] *nor interfere with the lower Court's* judgment, because it cannot agree with or support all the reasons given,[6] nor lay down any rule as to what weight should be attached to evidence,[7] or to the credibility of a witness [8] But if the finding of the lower Court is unnecessary for the disposal of the case *the Court may* expunge it from the record,[9] and if it is based on an error in law the Court is empowered to reverse it,[10] and fully decide the case if there is no legal evidence *on the record* to support the case of one party [11] or the remaining facts *found* by the lower Court are sufficient for its disposal,[12] but in all other cases of material error, either in law or procedure the Court from inability to determine facts *must remand* the case to have the error amended or for retrial as the case may be [13] If wrong issues have been fixed it can fix a proper issue and send it down for trial [14] *or direct* the lower Court to complete the inquiry if it has been inadequate [15] Or even direct a re trial,[16] and this last is the usual procedure where a very *material* error ... the lower Court [17] Where the ... ded a finding *without discussing* ... Judge came to a contrary conclu... Judge ought not to be accepted [18]

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[1] Ram Chunder Chowdhury v Kashi Mohun, (1874) 21 W R 57

[2] Indrajit Koonwari v Cheekwari (1863) B L R F B 1

[3] Lalun Chunder Singh v Shama Charn (1866) 11 Moo I A 7 p 19

[4] Kadambinee Dassee v Durga Churn Marsh 4

[5] Dwarkadas Lalubhai v Adam Ali (1865) 3 Bom H C A C J, p 5, but see section 103 *post*

[6] Rummeezuddeen v Joy Mala, (1871) 15 W R 503

[7] Oommut Fatima v Bhujo Gopal (1870) 13 W R, 50

[8] Putalee Kooer v Sheo Pershad, (1875) 24 W R, 61

[9] Nanda Lal v Lonomali, (1885) 11 Calc, 544

[10] ... Behary Lal v ... Churn (1875) 24 ... 431 Surnamoyee ... (1874) 21 W R, ... 208, Mahomed ...

[11] Tej Protap Singh v Champa Kalee, (1886) 12 Calc, 96

[12] Shah Jughun v Muksood Ali (1866) 6 W R, 97, see section 103 *post* Waigaitkar v Wadekar (1867 8) 5 Bom H C, A C, 194, Mohun Chunder Dhur v Kidge, (1863) Marsh. 381, Joy Ram Roy v Omrao Roy, (1869) 12 W R 431

[13] Nowab Khan v Rughoonath Doss, (1873) 20 W R, 474

[14] Shah Koondun Lall v Makhum Lal (1867) (1 N W P, 247, Goluck Chunder v Anunt Kishore, (1876) 25 W R, 38

[15] Shagur Chunder v Mohumaya, (1876) 25 W R 25

[16] Chunder Monee Dossee v Modhoo Dey, (1875) 23 W. R, 166

[17] Charoo v Zobeida Khatoon (1876) 25 W R, 54, Kristo Gobind Kur v Gunga Pershad (1876) 23 W R, 266, Goluck Nath v Kirti Chunder, (1889) 16 Calc, 645, Ram Coomar v Kalee Coomar, (1865) 10 W R, 279

[18] Babu Madhav v Venkatesh, (1882) 16 Bom, 540, see also Goburdhun v Sadhoo, (1864) 1 W R, 244

If the plaint does not disclose a cause of action, the proper order is to reject the plaint and not to dismiss the suit [1]

The fact that the High Court may have called for a case and decided it in regular appeal does not affect the ordinary course of appeal in execution of that ... when he has only the right ... andum of appeal from an ... *to consider whether any of* ... to the case, and if they do not, to reject the appeal summarily [3] No objection on the ground of misdescription or defect of parties can be permitted to be raised for the first time in second appeal [4] The plea that the suit is beyond the pecuniary limits of the *Munsif's jurisdiction should not be allowed to be raised in second appeal, if the* appellant does not appear to have been prejudiced [5] When a judgment debtor applies to have an execution sale set aside and alleges fraud on the part of the decree holder or auction purchaser, the application is one under s 244 former code (sec 47) though the question is between the judgment debtor and the auction purchaser, who is not the decree holder In such a case, a second appeal lies and the period of limitation is 3 years under art 178 [6] The Court in second appeal is competent to bring on to the record persons who had originally been joined in the suit, but were not joined in the appellate Court [7]

Unstamped document —An instrument not duly stamped will not be admitted in second appeal on payment of stamp and penalty, when there is no evidence that the stamp and penalty were tendered and refused on the hearing of the first appeal [8]

Limitation —See 'LIMITATION, Order XLI, r 1

Ninety days on the Appellate Side and twenty days on the Original Side from the date of the decree appealed against—arts 156, 157, Sched II, Act XV, 1877, the Court can extend the time for sufficient cause [9]

Letters Patent If two Judges differ as to the admission of an appeal after time, there is an appeal under the Letters Patent [10]

Special appeal —The High Court can in special appeal, look into the grounds upon which an appeal has been admitted after time by the lower appellate Court,[11] but it will not interfere if the Court has exercised its discretion in a sound and reasonable manner[12] and not capriciously or arbitrarily without sufficient legal material to support its decision [13]

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1 Gunga Narain v Tiluckram, (1887 8) L R, 15 I A, 119, 15 Calc, 533

2 Ramanoogra Sahoy v Byjnath Lall (1871) 15 W R, 164

3 Rudr Prasad v Baijnath, (1893) 15 All., 367

4 Sivaganga Taluk Board v Narayanan (1893) 16 Mad, 317

5 Muthusami v Nallakulantha, (1895) 18 Mad, 418

6 Nemai Chand Kanji v Deno Nath Kanji, (1898) 2 Calc. W N, 691

7 Paya Matathil Appu v. Kovamel Amina, (1896) 19 Mad, 151, but see *contra*, Chunni v Lala Ram, (1894) 16 All, 5.

8 Lakshmandas v Rambhau, (1896) 20 Bom, 791

9 Flowest v Kootoob Hossein, (1866) 1 Agra I B 100, Kashinauth v Mynooddeen (1864) W. R (F B), 146, Act XV, 1877, s 5

10 Husaini v Collector of Muzaffarnagar, (1887) 9 All, 655

11 Chunder Das v Boshoon Lall, (1882) 11 C L R, 177, 8 Calc 251, Mowri Bewa v. Surendra Nath, (1865) 2 B L R A C 184, note, 10 W R 178

12 Ranchodji v. Lallu, (1882) 6 Bom, 304, Fatima Begam v Hansi, (1887) 9 All, 244

13 Parvati v Ganpati, (1899) 23 Bom, 513, Tulsa Kunwar v Gajraj Singh, (1903) 25 All, 71, Hamid Ali v Gayadin, (1904) 26 All, 327

Sing . . liable to be impug admitted *ex parte*, . . [3]

Who may or may not appeal — A person who has no interest in a suit cannot file a special appeal A Hindu widow and her sons sued for confirmation of her title in certain property which she claimed as separate property, and both . . It was held . In a suit for . a party, in . . . .

a party to the suit [7]

Decree —Under the former Code an appeal lay from the decree only[8] and these rulings hold equally under this Code [9]

. must be an error of law and not of e an erroneous inference of law [11] the belief or disbelief of evidence s for general reasons not affecting the credit of any particular witnesses',[13] such as disbelieving a witness, because he is a naib patwaree [14] or for want of due consideration of evidence and for introduction of foreign matters into the case [15] or for improper mode of dealing with evidence [16] or for irregular dealing with evidence [17] or for improper rejection of evidence affecting the decision of the case on the merits ,[18] or basing

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1 Dubey Sahai v Ganesh Lal (1876) 1 All 34, Husaini v Collector of Mazuffarnagar (1887) 9 All, 11

2 Moshaullah v Ahmedullah (1886) 13 Calc, 78, Nenkatrayudu v Nagadu (1886) 9 Mad 450

3 Doorga Pershad v Radha Mohun (1871) 15 W R 536

4 Oog ee Chowdhrain v Keramutoollah (1872) 17 W R 219

5 Krishna v Mohesh (1905) 9 Calc W N 584

6 Boykant Ram v Poorno Chunder W R, 1864 Act X 97

7 Hira Lall v Chunder Kant (1898 9) 3 Calc W N, ch See *contra*, Kinoo Khan v Kawb z Molla (1896 7) 1 Calc W N, cc

8 Koylash Chunder v Ram Lall, (1881) 6 Calc, 206, Niamat Khan v Phadu Buldia (1881) 6 Calc, 323

9 See Definition of Decree p 7 *ante*

10 Meer Mahomed Hossain v Forbes, (1874 5) L R 2 I A, 1

11 Sevvaji v Chinna (1863 6) 10 Moo I A, 151 and see Shepherd v Henderson (1881) 7 App Cas, P 64, Elliott v Turquand, (1881) 7 App Cas, P 85

12 Ame run v Cheiag Ali, (1875) 24 W R, 343

13 Sheo Purshun v Brun Pandey, (1875) 24 W R, 251

14 Mackenzie v Jowahir Mahtoon, (1876) 25 W R, 137

15 Sooraj Kant v Khoobee Narain (1874) 22 W R, 9, Kooleep Narin v Rummon Singh (1874) 22 W R, 278

16 Ram Das v Man Mahani (1871) 7 B L R, App 4 Shibo Soondurce v Chunder Kant (1874) 21 W R, 217, Ameer Bepraree v Hurree Mohun, (1875) 23 W R, 87, but compare Mohun Matoon v Umatum, (1872) 18 W R, 499

17 Roop Naraince v Ressal Dewaree, (1875) 24 W R, 119

18 Huro Chunder v Gobind Chunder, (1872) 17 W R., . . Hassan v Nakchhadi (1906) 32 Calc, 200

the judg ... proper effect
to the
portion
absence of better evidence,[4] ...
the appearance of a document[5] or for allowing parol testimony to be governed by documents improperly admitted,[6] or for misconstruction of a document,[7] or for limiting the effect of a sale certificate by inferences drawn from other
... as where a Judge
... engaged,[10] or that
... existence or non
... ents not denied,[13]
or objected to[14] are admitted, or that from the fact of one person carrying on a
... person carrying it on,
... And an appeal will lie
... ding a fact without any
evidence or without evidence from which the conclusion might be reasonably
... by the evidence,[18]
... vidence a document
... f documents admit
ted,[20] or for starting with the assumption that certain evidence has not been produced, and it is on the record,[21] or for looking at the evidence of one side only,[22] or for complete disregard of evidence,[23] or coming to a decision upon a

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[1] Shunkhabun v Shurut Chunder (1875) 23 W R 160, Abdool Rohman v Sofy Mikhayesh (1875) 24 W R 293 Mohun Singh v Jugbutty (1875) 24 W R 297

[2] Sham Narain v Court of Wards (1873) 20 W R 197

[3] Appa Kulga v Mallu, (1892) 16 Bom, 477

[4] Gajhoo v Kotidar, (1907) 11 Calc W N 230 or excluding evidence of settlement proceedings and disregarding road cess returns Mohini v Kali Tara, (1907) 11 Calc W N 1028

[5] Lallah Jha v Tulleb Matool (1874) 21 W R 436

[6] Boido Nath v Russick Lall (1868) 9 W R 274, Puran Chunder v Grish Chunder (1868) 9 W R 460

[7] *Kalee Churn v Chundee Churn* (1868) 9 W R, 366, *Nowbut v Chutterdharee*, (1873) 19 W R 222, Imrit Lall v Mahomed Lall Zamah (1872) 18 W R, 447

[8] Mookhya Hurucknaj v Ram Lall, (1870) 14 W R, 435

[9] Ram Prosad Das v Rajo Koer, (1879 80) 5 C L R, 94

[10] Sevvaji v Chinna, (1863) 10 Moo I A, 151, p 164

[11] Ram Dhun v Ram Narain, (1869) 11 W R, 311

[12] Kakarla v Raja Venkata (1906) 29 Mad., 24

[13] Kutteebash Mavetee v Ramdhun, (1867) B L R, (F B), 608

[14] Narubhai v Naroshankar, (1880) 4 Bom H C, A C, p 101

[15] Shoobul Chunder v Koylash Chunder, (1870) 14 W R, 23

[16] Lachman Singh v Puna (1888 9) L R, 16 I A, 125, Chunder Kant v Showdaminee, (1868) 9 W R, 517

[17] Hemanta Kumari v Brojendro Kishore, (1890) 17 Calc, 875, L R 17 I A, 65, see, however, Virbhadrappa v Mahantappa, (1891) 15 Bom, 670

[18] Shivabasava v Sangappa (1805) 29 Bom, 1

[19] Baswa v Kalkapa, (1878) 2 Bom, 489, Ramappa v. Umanna, (1883) 7 Bom, 123.

[20] Damoo Mahata v Doya Coomaree, (1876) 25 W R, 101

[21] Hur Gobind v Joya Roy, (1875) 24 W R, 146

[22] Deo Surun Poory v Mahomed Ismail, (1875) 24 W. R, 300

[23] Heera Lall v Kalee Doss, (1875) 23 W R, 65, Annund Chunder v Rutnessur, (1876) 25 W R, 50.

question of fact after excluding a portion of the evidence under the erroneous impression that it is not legal evidence,[1] or for misconceiving the legal position of the parties[2]. A second appeal will lie from an order passed by a Judge refusing to confirm a sale on the ground that, when the confirmation of sale was applied for, there ... s 244 (section 47),[3] from ... und of fraud,[4] or from ... Court,[5] or from an order of the lower appellate Court, erroneously dismissing an appeal on the ground that no appeal lay[6]. When an appellate Court deems it necessary on the application of a party or otherwise that a commission for local investigation should be issued, the return to that commission should be before that Court, before it should proceed to hear the appeal. When the Court proceeds to determine the appeal without waiting for the return of the commission, there is a substantial error or defect in its procedure.[7]

Defect.—Admitting a re-hearing after time of a case decided *ex parte*,[8] omitting to arrive at some finding on certain material facts having an important bearing upon a question at issue in the suit,[9] omitting to decide a material issue,[10] omitting to decide a question of limitation though not raised,[11] finding a fact without giving reasons,[12] trying an issue not raised,[13] or trying a case without framing issues,[14] unless the parties have gone to trial knowing what the real question between them was,[15] refusing to issue a commission to examine a witness on the ground he was not material,[16] allowing the plaintiff in the lower appellate Court to change his suit from confirmation to one of recovery of possession,[17] refusing costs to a defendant who had successfully pleaded want of jurisdiction in both Courts,[18] adding a co-plaintiff,[19] remanding a case irregularly,[20] admitting a review without proper enquiry or proof where proof

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1 Mothoora v. Ram Ruchya (1869) 11 W R, 482

2 Doorga Churn v. Shamanund (1869) 12 W R 376

3 Doya Moyi v. Sarat Chander (1898) 25 Calc, 175 1 Calc W N, 656

4 Kahil Singh v. Idal Singh (1904) 31 Calc 385

5 Kishan Das v. Nawal Singh (1876) 1 All, 620

6 Mathura Mohan Pal v. Amiruddi Shilaloo, (1903) 8 Calc W N 64

7 Madho Singh v. Kashi Singh, (1894) 16 All, 342

8 Runglal Misser v. Lokhun Misser, (1877) 2 Calc, 114

9 Dinanath v. Hari Dasi (1885) 11 Calc, 499

10 Ram Kor v. Gangaram (1892) 16 Bom 545 Gopal Roy v. Teknil Roy, (1867) 8 W. R, 333

11 Saluji Kesriji v. Rajsangji, (1864) 2 Bom. H C, 162

12 Ningappa v. Shivappa (1895) 19 Bom, 323, Kamat v. Kamat (1884) 8 Bom, 368

13 Ram Soondur v. Kaleo Pershad (1873) 19 W. R, 267 Palaniyandi v. Muttusami (1865) 2 Mad H C, 441

14 Rewun Pershad v. Jankee, (1863) 11 Moo I A, 27, Sheo Sahoy v. Bechun Singh, (1874) 22 W R, 31, Chunder Monee Dossee v. Modhoo Dey, (1875) 23 W R, 166

15 Mitna v. Fuzl Rub, (1870) 13 Moo I A, 583

16 Jhotee Singh v. Gopal Singh, (1875) 23 W R, 457

17 Teeietput Singh v. Sudersan Das, (1879) 4 Calc., 46

18 Moshingan v. Mozari, (1886) 12 Calc, 271

19 Googlee Sahoo v. Premlall, (1881) 7 Calc, 148

20 Nanabhai v. Ramshet, (1869) 6 Bom H C, A C, 150, Ram Kant v. Guneshee (1866) 6 W R, 47, but see *contra* Nowcowree v. Mookta, (1865) 2 W. R, 181, Jugobundhoo v. Sreenarain, (1873) 20 W R, 188, Gungamonee v. Issur, 17 W R, 465

is necessary [1] omitting to examine witnesses tendered[2] have been considered good grounds for special appeal An objection to the frame of the suit on the ground of misjoinder of two plaintiffs with two distinct causes of action can be raised in second appeal[3] When an appeal was heard *ex parte* by the lower appellate Court and the decree of the Court of first instance reversed in the absence of the respondent on whom notice of appeal had not been duly served and who was not aware of the proceedings till after the time for applying for a rehearing under s 560 of Act XIV of 1882 O XLI r 21 and the Limitation Act, Sched. II art. 169 had expired *held* that the High Court in second appeal had power to interfere[4]

Costs —See note under section 35 *ante*

Finding of fact—An appeal does not lie on the ground of an erroneous finding of fact however gross and inexcusable the error may be[5] but an appeal does lie to impeach the conclusions arrived at from the finding[6] The High Court should not interfere with inferences of fact drawn by a lower appellate Court.[7] Where there is no error or defect in the procedure the finding of the first appellate Court is final if that Court had before it evidence proper for its consideration in support of the finding and an appeal will not lie on the ground that the lower Court has misapprehended the evidence discarded or not given sufficient weight to other evidence or given weight to other evidence to which it was not entitled[8] but if reasons are not given for the finding it does not bind in Bombay[9] The existence of a custom[10] of a right of user[11] of good faith[12] of reasonableness of notice[13] of an implied contract to pay rent at a consolidated rate[14] are questions of fact and so is the amount of damages to be awarded[15] and so also is the

[illegible] (18[illegible]) [illegible] W R [illegible] 84 [illegible] He [illegible] (18[illegible]) [illegible] L R (18[illegible]) 25 W R [illegible] ther [illegible] (18[illegible]) 23 W R [illegible] (1854) [illegible] 555 see also Gholam [illegible] (1860) 3 W R Act X 169

[2] [illegible] Das (1893) [illegible] Cal [illegible] 40

[4] [illegible] Chandra (1897) [illegible] Calc 540 Bal[illegible] Rau [illegible] (1896) 19 Mad 414

[5] [illegible] (1889) 16 Cal [illegible] 645

[6] Ram Gopal [illegible] (18[illegible]) L R 19 I A [illegible] 20 Calc 93 [illegible] (1891) L R 19 I A 48 [illegible] Calc

H[illegible] (18[illegible]) 13 W R 311 [illegible] (18[illegible]) [illegible] W R 418 [illegible] (18[illegible]) [illegible] W R 4

R[illegible] (18[illegible]) [illegible] Calc [illegible] Pertap Chunder [illegible] (188[illegible]) [illegible] L R 16 I A [illegible] 3 followed in [illegible] (18[illegible]) [illegible] (1890) [illegible] All 649 [illegible] (1883) [illegible] Calc [illegible] L R 16 I A [illegible] (1889) 16 Calc [illegible] (1891) L R 18 I A [illegible] 18 Cal 448 Ram Ratan [illegible] (189[illegible]) [illegible] Calc [illegible] L R 19 I A [illegible] (18[illegible]) [illegible] Calc [illegible] Calc W N 649 [illegible] (1893) [illegible] Bom 430 [illegible] (19[illegible]) [illegible]

[9] [illegible] (1[illegible]) 11 Bom 45 [illegible] (1895) 19 Bom [illegible]

[10] Syud Al[illegible] Doss (1870) 13 W R 45 [illegible] (18[illegible]) [illegible] W R [illegible]

W[illegible] (18[illegible]) [illegible] W R 85 [illegible] (18[illegible]) [illegible] B L R App 84 14 W R [illegible]

[11] [illegible] (18[illegible]) [illegible] B L R App [illegible]

[12] [illegible] (1886) [illegible] Cal [illegible]

[illegible] (1894) 17 M[illegible]

[illegible] (18[illegible]) 10 W R 164 see also [illegible] (18[illegible]) 13 W R [illegible]

meaning of a document or a deposition,[1] but the construction of it i.e., its legal effect, is a matter of law.[2] It cannot detract from the weight of concurrent findings of fact that they have been arrived at for different reasons.[3] The question whether the properties in suit passed under a sale certificate is a question of fact.[4] The High Court has no jurisdiction

n original case, but as an appeal, is precluded from going into facts, d only to cases when evidence is taken in the first Court.[7] When the lower appellate Court arrived at an erroneous conclusion by relying on a comparison between two signatures in which there were considerable discrepancies, the High Court reversed its decision and remanded the case for retrial.[8] When the decision of a Judge is based neither on evidence nor admissions, it is not binding in second appeal.[9] The High Court can interfere if the lower appellate Court draws erroneous conclusions by assuming a state of things in favour of the defendant which is contradictory to his case.[10] When the lower appellate Court draws conclusions from evidence not warranted by law or reason and fails to try a material issue in the case, a second appeal will lie.[11] When a finding of fact is based on an erroneous view of the plaintiff's conduct having amounted to acquiescence, the finding of fact may be set aside, and the case remanded for a fresh finding.[12] When the finding of the existence of a usage is based mainly ial.[13] The finding on a misconception of what legal finding on it.[14] undness of an inference drawn from a finding of fact.[15]

Mixed questions of fact and law.—In an ejectment suit the evidence of the plaintiff's title to the property consisted of evidence of acts of user from which the Court was asked to infer ownership in the absence of proof of a better title by the defendant. On the evidence the District Judge held that the plaintiff's title was not proved. *Held*, that this finding, which was a mixed one of law and fact, was a finding with which the High Court could not interfere on second appeal.

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[1] Himmat Ali v. Nyamutoollah, (1875) 23 W. R., 250; Chatenay v. Braz. Telegh Co., 1 Q. B., (1891) 79.

[2] Id., and see Nowbut Singh v. Chutter Dharee, (1873) 19 W. R., 223. But see Rudr Prasad v. Baijnath, (1893) 15 All., 367, p. 371.

[3] Nil Moni v. Kuti Chunder, (1893) 20 Calc., 847; L. R., 20 I. A., 93.

[4] Wahidunnissa v. Bipin Bahari, (1896-7) 1 Calc. W. N., ccxvii.

[5] Lukhi Narain v. Jodu Nath, (1893-4) L. R., 21 I. A., 39; 21 Calc., 504.

[6] Hari v. Surendra, (1907) 11 C. W. N., 794; 6 Calc. L. J., 794.

[7] Beni Pershad v. Nand Lal, (1897) 24 Calc., 89.

[8] Puoodee Bibee v. Gobind Chunder, (1874) 22 W. R., 272.

[9] Vishvanath v. Dhondappa, (1893) 17 Bom., 475.

[10] Surbessur v. Chota Azizoollah, (1871) 8 B. L. R., App., 78; 17 W. R., 213; see also, Poona Chunder v. Chunder Coomar, (1875) 24 W. R., 171.

[11] Maharam Shiekh v. Nakowri Das, (1871) 7 B. L. R., App., 17; see also Huro Prosad v. Woomatara, (1881) 7 Calc., 263.

[12] Rambhat v. Bababhat, (1894) 18 Bom., 255.

[13] Palakdhari v. Manners, (1896) 23 Calc., 179.

[14] Gamnl v. Vithal, (1895) 20 Bom., 753.

[15] Krishna Kishore v. Mir Mahomed Ali, (1898-9) 3 Calc. W. N., 255.

When *from the facts found by the lower Court* the legal inference to be drawn is certain, the High Court in second appeal may correct the erroneous conclusions drawn by the lower appellate Court When, however, the legal inference to be deduced from such facts is doubtful, it is not open to the High Court in second appeal to interfere with the findings of the lower Court [1] A second appeal will lie on a finding of adverse possession, when such finding is a mixed question of law and fact depending upon the proper legal conclusion to be drawn from the finding as to simple facts [3] The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court

Ishwar Chandra Santra v Satish

c l in second appeal as the lower

important portion of the evidence,

the evidence involved an error of law

Question of law —The proper inference to be drawn from the terms of a document is a question of law and can be considered in second appeal [5] But when the construction of documents is not in issue and the sole question is as to their effect as evidence, there is no question of law involved [6] If the decree appealed against is based on a wrong view of the law of evidence, or on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, the High Court will interfere in second appeal [7] When the lower appellate Court arrives at a conclusion which is based upon an erroneous view of law the judgment is open to question in second appeal [8] So also when there was no evidence before the lower Appellate Court upon which it could properly arrive at the conclusion of fact to which it did arrive [9]

Disregard of an Amin's second report is not a substantial error of defect of procedure and constitutes no error of law [10] The Court will not interfere on special appeal with a decree proceeding on a mistake as to the applicability of a law, when such error does not affect the decision of the case [11]

Procedure —When the first Court had in the absence of evidence found that a compromise upheld by the lower Court was not for the benefit of a certain infant, *held*, that this was a substantial error or defect in the procedure of the first appellate Court, and that the High Court was right in second appeal in restoring the decree of the lower Court [12] When the lower appellate Court passes separate decrees in appeals relating to the same matter between the same *parties against the same person*, separate second appeals must be filed [13] When the High Court on special appeal was of opinion that the judgment of the District Judge reversing that of the Munsiff on the credibility of the witnesses did not fulfil the conditions that a judgment reversing such decision ought to

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[1] Rajaram *v* Ganesh Hari, (1897) 21 Bom, 91

[2] Luchmeswar Singh *v* Manowar Hossein (1891 2) L. R 19 I A, 48, 19 Calc, 253

[3] Gnanammal *v* Muthu Sami, (1890) 13 Mad, 47.

[4] Ishwar Chandra Santra *v* Satish Chandra Giri, (1902) 7 Calc, W N, 126

[5] Chockalingam *v* Mayandi Chettiar, (1896) 19 Mad, 485 But see, Rudr Prasad *v* Baijnath, (1893) 15 All., 367, p 371

[6] Lachman Lal *v* Kanhaya Lal, (1894) L R, 22 I. A, 51, 22 Calc, 609

[7] Desai Ranchhodas *v* Rawal Nathubhai, (1897) 21 Bom, 110.

[8] Ishan Chunder *v* Bishu Sirdar, (1897) 24 Calc, 825; 1 Calc W. N, 665

[9] Shivabasava *v* Sangappa, (1904) 8 Cal W. N, 865

[10] Lakhi Narain *v* Jodu Nath, (1893) L R, 21 I. A, 39, 21 Calc, 504

[11] Kureem Khan *v* Muhfooz, W R, F. B, 16; Akbur Ali *v*. Hossein Ally, (1866) 5 W R Mis, 29

[12] Hemanta Kumari *v*. Brojendro Kishore, (1889 90) L. R, 17 I A, 65; 17 Calc, 875

[13] Chathu *v* Kunhamed, (1888) 11 Mad., 280

fulfil, the case was brought before itself and was heard by it as a regular appeal [1] So, too, when the lower appellate Court disposes of a suit upon a case not raised by the parties, and to which the evidence had not been directed [2]

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facts established to its satisfaction are well founded or not [3] In *Bhuput Rai* v *Kali Rai*,[4] the judgment of the lower appellate Court was set aside on the
trial of the case was not in
and circumstances of the

Appeal does not lie — A
of a discretionary power [5] such
each particular proof offered :
dence,[7] or admitting it [8] or refusing to allow an appeal by A for a minor B to stand for B he not being a minor [9] or from an order refusing to allow an appeal to be withdrawn [10] or refusing to restore an appeal withdrawn [11] or refusing to allow more evidence after the party had closed his case,[12] or refusing or awarding costs [13] or adding [14] or refusing to add parties,[15] or allowing or disallowing interest on a decree [16] or refusing to summon plaintiff as a witness [17] or dismissing the suit for the plaintiff's refusal to answer a material question [18] or dismissing or decreeing a suit for non attendance of a party when ordered by the Court to attend in person [19] or refusing to fine a recusant witness [20] or refusing to admit an appeal after time,[21]

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[1] Parmeshur v Brijo Lall (1890) 17 Calc, 256

[2] Shivabasava v Sangappa (1904) 8 Calc W N, 865 L R, 31 I A, 154

[3] Protap Narain Singh v Roghu Ram Hazra, (1901) 6 Calc W N, 185

[4] Bhupat Rai v Kali Rai (1902) 6 Calc W N, 357

[5] Gopal Khundee Rao v Deokee Nundun, (1874) 6 All H C, 173

[6] Muthra v Magh Singh (1870) 2 All H C 207

[7] Kulpo Singh v Thakoor Singh (1871) 15 W R 429 Golam Mukdoom v Hafeezoonnissa (1867) 7 W R 489 Mohesh Chunder v Shoshee Mookhee, (1866) 6 W R, 196 Ram Piari v Kallu (1901) 23 All, 121

[8] Radhanath Doss v Khellut Chunder (1872) 17 W R, 558 but see Hafiz Abdul Kurrim v Srikissen (1885) 11 Calc, 139

[9] Shama Charan v Tarak Nath (1869) 3 B L R, App, 115

[10] Raj Kishen v Raj Kishen (1866) 6 W R. Act X 24

[11] Mudhoomutty Debia v Dhurput Singh (1870) 13 W R 167

[12] Rakhal Doss v Protap Chunder (1869) 12 W R, 435

[13] Ooma Churn v Grish Chunder (1876) 25 W R 22 Futeek Parooee v Mohender Nath (1876) 1 Calc 385 25 W R 226, Achumbit v Kunhya Lall (1867) 7 W R 208 Beer Pershad v Doorga Pershad W R, (1864) 215 Daulat Ram v Durga Prasad (1893) 15 All, 333

[14] Gayaram v Issur Chunder, (1865) 2 W R 158

[15] Jagadamba v Haran Chandra (1868) 10 W R, 109, 6 B L R, 526, note, Puran Mundol v Sham Chand (1864) 1 W R, 228

[16] Pites Nath v Kisto Mohan (1869) 3 B L R, App, 105, 12 W. R, 50

[17] Indro Lochun v Grish Chunder, (1868) 10 W R, 134

[18] Jeshta Ramji v Awaker Mullandigattea, (1866 7) 3 Mad H. C, 299

[19] Narain Doss v Mahtab Chunder, (1868) 10 W R, 174, but see, Kisto Coomar v Gobind Coomar, W R, (1864) 133

[20] Prankisto v Kalee Doss, (1867) 7 W R, 460.

[21] Roghoonath Singh v Roy Mohun Lal (1867) 7 W. R, 296, Phoolbaree v Bisheshur Pershad (1863) 3 Agra 301 but see, Gopeenath Roy v Gopeenath Chatterjee, (1866) 6 W R., Mis., 106, Gungadas v Ramjoy, (1886) 12 Calc 30

nor on the mere ground that the lower Court has not recorded the reasons for its decision in the manner prescribed in this Code,[1] nor on a ground relating
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ing the reason for rejecting documentary evidence,[6] nor for the absence of any finding on the proper custody of a document admittedly 100 years old,[7] nor for omission to give reasons for believing witnesses,[8] and disbelieved by the first Court,[9] *nor for taking additional evidence*,[10] nor for disbelieving a witness on the ground that he was interested nor for any other reason within its

on as evidence[17] nor for omitting to decide a point raised[18] nor where no appeal lay to the lower Court[19] nor where the lower Court dismissed an appeal after hearing it on the merits, though no appeal lay[20] nor from an order of a District Judge confirming the judgment of a Subordinate Judge erroneously deciding that he has no jurisdiction to execute his own decree, merely because the amount decreed together with interest has exceeded the limit of his pecuniary jurisdiction[21] nor because the lower Court admitted documents

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1 Bisvanath v Baidyanath (1886) 12 Calc 199 Bhagvatsingji v Partabsangji, (1867) 4 Bom. H C 105

2 Doorga Churn v Shamanund (1869) 12 W R 376

3 Mackenzie v Jowahir Mahton (1876) 25 W R, 137

4 Dhoondh Bahadoor v Priag Singh (1872) 17 W R 314

5 Sheo Golam v Mahadeo Lall (1872) 18 W R 110

6 Munee Dutt v Campbell (1869) 11 W R 278, but see, Surosutty v Umbikanund (1875) 24 W R 102

7 Buddiooddeen v Golam Peer (1872) 17 W R 279

8 Shumshurood ly v Jan Mahomed (1874) 21 W R, 260

9 Luckheemonee v Rajkishore (1865) 4 W R 106, Mukdoomunnissa v Nokhy Singh (1875) 24 W R 296

10 Hafiz Abdul Kurrim v Srikissen (1885) 11 Calc, 139, see also Pran Nath v Ram Coomar (1878) 2 C L R 33

11 Dwarkanath Doss v Mud lun Mohan (1866) 6 W R, 292

12 Heeralall v Gungadhur (1862) W R (F B) 19 Macdonald v Munar Ray (1863 7) B L R (F B) 308 (186) 3 W R, Act X 153 Graham v Lopez (1864) 1 W R, 141 Bykunt Nath v Pearee Monee, (1864) 1 W R 196, Poorno Prashad v Chunder Nath (1864) 1 W R, 249, Rajkisseen v Huromohun, (1866) 5 W R, 248, Kisah Beharee v Saheb Roy, (1869) 12 W R, 76

13 Watson & Co v Nidhoo, (1868) 10 W, R 87, and see Barker v Furlong, 2 Ch (1891) 172

14 Bhugwan Chunder v Dukhina Debia, (1867) 8 W R, 306

15 Akjoo Bibee v Koonjoo Beharee, (1873) 19 W R, 288 Gopal v Tincowree, (1873) 19 W R., 349, Meher v Keramut Ali (1874) 22 W R., 402

16 Bhagvatsingji v Partabsangji, (1867) 4 Bom H C, 105

17 Savi v Punchanun, (1876) 25 W R, 503

18 Wise v Huro Lall, (1871) 16 W R, 150

19 Hurdyal Singh v Kunhya Lall (1873) 19 W R 247 Chidambara Pillai v Kaman (1862 3) 1 Mad, H C, 189 Ganga Charan v Sasti Mandol, (1902) 6 Cal W N 614

20 Gholam Fshak v Hyder Moollah, W R., (F B,) 46

21 Shamraw v Niloji, (1886) 10 Bom, 200

insufficiently stamped,[1] or refused to admit a document even on payment of stamp duty and penalty[2] or allowed secondary evidence to be given without payment of necessary stamp duty, when it was lost[3] or did not sent for a [illegible]

[illegible]

Judge omitted to record an opinion on an Ameen's report[7] or found the [illegible]

[illegible]

nor for a mistake in account[10] nor for hearing a case before the fixed date, if the parties are present[11] nor generally for any error not of importance[12] or not appealed against in the lower Court[13] such as the admission of immaterial evidence[14] A judgment debtor whose property had been sold in execution of a decree and purchased by the decree holder applied that the sale should be set aside on the ground that the person at whose instance execution had proceeded had been improperly brought on the record The application was rejected by the Court of first instance and an appeal by the applicant was dismissed *Held* that no second appeal lay to the High Court[15] An appeal will not lie to set aside a decree against a party not a party to the appeal against which the second appeal is preferred[16] No appeal lies against an order of an appellate Court returning a memorandum of appeal for presentation to the proper Court[17] No second appeal will lie when a Court of first appeal has disallowed the appellant's plea of excuse for not having filed the appeal within limitation, exercising therein a judicial discretion after consideration of the facts[18]

Appellate decree passed ex parte—See[19]

Grounds of appeal—See "MEMORANDUM OF APPEAL," Order XLI, r 3 and notes on Order XLI, r 2

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[1] Makbul Ahmad v Iftikharunissa, (1875) 7 All H C 124, Hur Chander Ghose v Wooma Soonduree Dossee, (1875) 23 W R, 170 and see the case of Gurpadapa v Naro (1889) 13 Bom 493

[2] Gambhirmal v Chojmal (1873) 10 Bom, H C, 406

[3] Haran Chunder v Russick Chunder, (1873) 20 W R, 63

[4] Chundi Churn v Doorga Persad, (1882) 12 C L R, 81

[5] Somasekhara v Subhadramaji (188?) 6 Bom, 524, Gulam v. Badrudin, (1889) 13 Bom, 336

[6] Kisto Churn v Dwarka Nath (1868) 10 W R, 3?, but see Govinda Menon v. Karuna Kara, (1901) 24 Mad, 43

[7] Bundhoo Sookool ... v Joy Prokash Singh, W R, (1864) p 367

[8] Sheo lyal v Hodgkinson (1875) 24 W R, 342

[9] Shama Soonduree v Rohimood ... (1875) 24 W R, 71

[10] Ram Kanth Roy v Kalee Mohun, (1874) 22 W R, 310 Prosunno Coomar v. Chytunno Churan (1876) 25 W R, 74

[11] Hukeemunnissa v Muckdoonum (1864) 1 W R, 246

[12] Chamroo Singh v Tota Roy, (1873) 19 W R, 430

[13] Achumbheet Tewaree v Bhugwant Pandey, (1869) 1 All H C, 161

[14] Watson & Co. v Gopee Soonduree Dossee (1875) 24 W R, 392

[15] Daivanayagam v Rangasami, (1896) 19 Mad, 29

[16] Rama Kurup v Sridevi (1893) 16 Mad, 290

[17] Raghunath Charan v Shamo Koeri, (1904) 31 Calc, 344

[18] Tulsa Kunwar v Gajraj Singh, (1903) 25 All 71.

[19] Ajudhia Prasad v Balmukand (1886) 8 All 354, and also Kali Kishore v. Dhununjoy, (1878) 3 Calc, 228, Maruti v Vithu, (1892) 16 Bom, 117

The memorandum need not be accompanied by the decree of the first Court [1]

A vakeel cannot certify his own appeal [2]

Plaintiffs having been granted an adjournment in order to obtain a certificate under Act XXVII of 1860 failed to avail themselves of the opportunity The suit was accordingly dismissed and the High Court refused to disturb the decision [3]

The grounds of special appeal should be full [4] and specific, and should clearly indicate the error of law assigned, or the substantial error or defect in law or procedure or investigation which is imputed and in the latter case it should be made to appear on the face of the ground of appeal that such error or defect probably produced error or defect in law in the decision by stating what bearing the supposed error or defect had on the merits of the case [5]

The general rule as to grounds of appeal is that a party is not entitled to relief upon facts or documents not referred to or stated in the pleadings,[6] or inconsistent with them,[7] nor on any ground which has never been considered, taken, or tried in the Courts below[8] except it is a pure point of law going to the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record,[9] but it is in the discretion of the Court to allow or disallow a plea of limitation not set out in grounds of appeal[10] And where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted, they cannot afterwards, in a special appeal, question it and recede from the tacit admission [11] and where

First raised in special appeal Parties should not be allowed to present a new case in special appeal [1] except under very special circumstances,[16] there each of the parties has gone into evidence upon the issues raised in the lower Courts no question as to whether the onus lies on the one or on the other can arise in special appeal [1] where the first Court refused to summon his witnesses the party was not allowed to raise this in special appeal [18] So, a question

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[1] Pirathi v Venkatramanayyan (1882) 4 Mad, 419

[2] Thakoor Doss Mookerjee v Ameer Mundul (1870) 14 W R 168

[3] Batasi v Mahesh (1883) 5 All 555

[4] Ram Kant v Raj Chunder (1869) 11 W R 246

[5] Nund Kishore v Ram Kulpo Roy (1871) 15 W R 8

[6] Mohummud Zahoor v Rutta Koeer (1866 7) 11 Moo I A 475

[7] Eshen Chunder v Shama Churn, (1866 7) 11 Moo I A 7

[8] Sreemutty Dossee v Lalunmonee (1867 8) 12 Moo I A 475, Pretap Chunder v Collector of Gowalparah (1874) 22 W R 216

[9] Fakir Chand v Ananda Chunder (1887) 14 Calc 586

[10] Balaram v Mangta Das, (1907) 11 Calc W N, 959

[11] (1873) 13 B L R, 155, Pom H C, 28, Gunga

[12] 91

[13] Buksh Ali v Joyanut (1869) 11 W R, 248 Kali Coomar v Brohmomoye, (1864) 1 W R, 23 Soodukhina v Raj Mohun (1869) 11 W R, 350, see, however, Lachman Prasad v Bahadur Singh (1879 80) 2 All, 884

[14] Doorgaram Roy v Nuro Singh, (1869) 11 W R, 134

[15] Madari v Malki, (1884) 6 All, 428

[16] Osman Singh v Chummun Mahtoon (1871) 15 W R, 87

[17] Huree Mohun v Assur Beharee, (1875) 23 W R, 324, Gulam v Badrudin, (1889) 13 Bom, 336

[18] Onooroop Chunder v Heera Monee Dossee, (1869) 11 W, R, 418

of the competency of plaintiff to sue as agent,[1] as guardian,[2] or as co sharer,[3] whether of the value of the suit, or the residence of the defendant or any other facts, which are necessary for jurisdiction [4] whether the plaintiff could have demanded further relief
that defendants being strangers to the
to a suit for specific performance [6]
for the first time in special appeal unless it can be decided upon the record before the Court [7] Incompetency to bring a suit [8] or inadmissibility of a document [9] or incompetency of the arbitrators to administer other than the usual oath,[10] or any matter of law going to the root of the plaintiff's suit,[11] such as want of jurisdiction patent on the record,[12] or that there is no cause of action,[13] and the point manifestly arises out of the pleadings [14] or want of notice in a suit for ejectment of a tenant [15] or that the lower Courts have misconceived the whole case,[16] may be raised on special appeal, but not limitation,[17] raised orally at the hearing as to the presentation of the respondent's appeal in the lower appellate Court [18] nor any plea not taken in the memorandum, such as the non payment of deficit stamp duty on the memorandum of appeal in the lower appellate Court within the period of limitation,[19] nor non joinder of parties,[20] nor misjoinder,[21] nor

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1 Soorendra Nath Roy v Rughoobur Dyal (1871) 15 W R, 392

2 Thummun v Golab Rai (1870) 2 All H C 89

3 Nanoo Roy v Joomuck Lall Dass (1872) 18 W R 376

4 Ir see Ramtarak R, 414, note, 60, Ramanund

5 Chomu v Umma, (1891) 14 Mad, 46

6 Dodhu v Madhavrao (1894) 18 Bom 110
Kanahai Lal v Suraj Kunwar, (1899) 21 All 446

8 Radha Kishen v Bukhtawur Lal, (1866) 1 Agra 1

9 Oomatool Fatima v Ghunnoo Singh (1873) 19 W R, 22, but see, Joygopal v Thakomonee (1869) 11 W R 381

10 Wahulla v Ghulam Ali, (1876 7) 1 All, 535

11 Kuppa v Dorasami (1883) 6 Mad 76

12 Bapuji v Umedbhai, (1871) 8 Bom H C, A C J, 245, Mohan Ishwar v Haku Rupa (1880) 4 Bom, 638, Nyamtula v Nana, (1889) 13 Bom, 424

13 Jan Ali v Abdoor Rahaman, (1870) 14 W R, 420, Parbati Churn v Kali nath, (1870) 6 B L R, App, 73, Amrita v Naru, (1889) 13 Bom, 489

14 Mahammad Ismail, v Chattar Singh, (1882) 4 All, 69.

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16 Kaleo Mohun v Kaleo Kisto (1869) 11 W R, 183 2 B L R., App, 39, Narayana v Muni, (1887) 10 Mad, 363

17 Shivapa v Dod Nagaya, (1887) 11 Bom, 114

18 Ahmad Ali v Waris Husain, (1893) 15 All, 123

19 Ram Kishen v Dipa Upadhia, (1891) 13 All, 380

20 Moidin Kutti v Krishnan, (1887) 10 Mad, 322

21 Durshun v Saminah Bibee (1864) 1 W R, 114, Maula v. Gulzar Singh, (1894) 16 All, 170, [compare Tarinee Churn v Hunsman, (1873) 20 W. R, 240], Magaluri v. Narayana, 3 Mad, 359, Nujmooddeen Ahmed v Zuhoorun, (1868) 10 W. R, 45, Ram Dyal v Ram Doolal, (1869) 11 W R, 273, Tilack Chunder v Muddun Mohun, (1869) 12 W. R., 504.

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The general rule as to grounds of appeal is that a party is not entitled to relief upon facts or documents not referred to or stated in the pleadings,[6] or inconsistent with them [7] nor on any ground which has never been considered, taken, or tried in the Courts below[8] except it is a pure point of law going to the question of the jurisdiction of the lower Courts and capable of being determined without the

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[1] Pirathi v Vencatramanayyan (1882) 4 Mad, 419

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[6] Mohummud Zahoor v Rutta Koer (1866 7) 11 Moo I A 475

[7] Eshen Chunder v Shama Churn (1866 7) 11 Moo I A, 7

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[9] Fakir Chand v Annunda Chunder (188 14 Calc 586

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[11] Mc 1875) 15 B L R, 155, Bom H C, 28, Gunga

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[13] Buksh Ali v Jowanut (1869) 11 W R, 248, Kali Coomar v Brohmomoye, (1864) 1 W R, 23 Soodukhina v Raj Mohun (1869) 11 W R, 350, see, however, Lachman Prasad v Bahadur Singh (1879 60) 2 All, 884

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of the competency of plaintiff to sue as *agent*,[1] as guardian,[2] or as co sharer,[3] whether of the value of the suit, or the residence of the defendant or any other facts, which are necessary *for jurisdiction* [4] whether the plaintiff could have demanded further relief and should not get a declaration,[5] or that defendants being strangers to the *agreement could not* be made parties to a suit for specific performance [6] None of these questions should be allowed for the first time in special appeal *unless it can be decided* upon the record before the Court [7] Incompetency to bring a suit [8] *or inadmissibility* of a document [9] or incompetency of the arbitrators to administer other than the usual oath,[10] or any matter of law going to the root of the *plaintiff's suit*,[11] such as want of jurisdiction patent on the record [12] or that there is no cause of action,[13] and the point manifestly arises out of the *pleadings* [14] *or want of* notice in a suit for ejectment of a tenant [15] or that the lower Courts have misconceived the whole case,[16] *may be raised* on special appeal but not limitation,[17] raised orally at the hearing as to the *presentation of the* respondent's appeal in the lower appellate Court [18] nor any plea not taken in the memorandum, such as the non payment of deficit stamp duty *on the memorandum* of appeal in the lower appellate Court within the period of limitation,[19] nor non joinder of parties,[20] nor misjoinder,[21] *nor*

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[6] Dodhu v Madhavrao (1894) 18 Bom, 110

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[8] Radha Kishen v Bukhtawar Lal (1866) 1 Agra, 1

[9] Oomatool Fatima v Ghunnoo Singh (1873) 19 W R, 22, but see, Joygopal v Thakomonee, (1869) 11 W R, 381

[10] Wahulla v Ghulam Ali, (1876 7) 1 All, 535

[11] Kuppa v Dorasami, (1883) 6 Mad 76

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[14] Mahammad Ismail, v Chattar Singh, (1882) 4 All, 69

[15] Abdu ... 407 of app N ...

[16] Kalee Mohun v Kalee Kisto (1869) 11 W R, 183 2 B L R, App, 39, Narayana v Muni, (1887) 10 Mad, 363

[17] Shivapa v Dod Nagaya, (1887) 11 Bom, 114

[18] Ahmad Ali v Waris Husain, (1893) 15 All, 123

[19] Ram Kishen v Dipa Upadhia, (1891) 13 All, 580.

[20] Moidin Kutti v Krishnan, (1887) 10 Mad, 322.

[21] Durshun v San ... (1894) 16 All, 130 ... Macaluri v. ... 2401 ... 10 W. R, ... Chunder v K.....

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be made to appear on the face of the ground of appeal that such error or defect probably produced error or defect in law in the decision by stating what bearing the supposed error or defect had on the merits of the case [5]

The general rule as to grounds of appeal is that a party is not entitled to relief upon facts or documents not referred to or stated in the pleadings,[6] or inconsistent with them,[7] nor on any ground which has never been considered, taken, or tried in the Courts below[8] except it is a pure point of law going to the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record,[9] but it is in the discretion of the Court to allow or disallow a plea of limitation not set out in grounds of appeal [10] And where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted, they cannot afterwards, in a special appeal, question it and recede from the tacit admission,[11] and where

First raised in special appeal—Parties should not be allowed to present a new case in special appeal,[15] except under very special circumstances,[16] there each of the parties has gone into evidence upon the issues raised in the lower Courts, no question as to whether the onus lies on the one or on the other can arise in special appeal,[17] where the first Court refused to summon his witnesses the party was not allowed to raise this in special appeal [18] So, a question

1 Pirathi v Vencatramanayyan (1882) 4 Mad, 419

2 Thakoor Doss Mookerjee v Ameer Mundul (1870) 14 W R, 168

3 Batasi v Mahesh (1883) 5 All 555

4 Ram Kristo v Raj Chunder (1869) 11 W R 246

5 Nund Kishore v Ram Kulpo Roy (1871) 15 W R, 8

6 Mohummud Zahoor v Rutta Koor, (1866 7) 11 Moo I A, 475.

7 Ishen Chunder v Shama Churn, (1866 7) 11 Moo I A, 7

8 Sreemutty Dossee v Lalunmonee (1867 8) 12 Moo I A, 475, Protap Chunder v Collector of Gowalparah (1874 22 W R 216

9 Takri Chand v Anundi Chunder (1887) 14 Calc, 586

10 Balaram v Mangta Das, (1907) 11 Calc W N, 950

11 e, (1875) 15 B L R., 155; 5) 2 Bom H C, 28; Gunga 136

12 R, 91

13 Buksh Ali v Joyanut, (1869) 11 W. R 249, Kali Coomar v. Brohmomoye, (1864) 1 W R, 23, Soodukhina v Raj Mohun, (1869) 11 W R, 350, see, however, Lachman Prasad v Bahadur Singh, (1879 80) 2 All, 884.

14 Doorgaram Roy v Nuro Singh, (1869) 11 W. R, 134

15 Madari v Malki, (1884) 6 All, 428.

16 Osman Singh v Chummun Mahtoon, (1871) 15 W. R, 87

17 Huree Mohun v Asgur Beharee, (1875) 23 W. R, 324, (1889) 13 Bom, 336.

18 Onoroop Chunder v Heera Monee Dossee, (1869) 11 W. R

of the competency of plaintiff to sue as agent,[1] as guardian,[2] or as co sharer,[3] whether of the value of the suit, or the residence of the defendant or any other facts, which are necessary for jurisdiction [4] whether the plaintiff could have demanded further relief and should not get a declaration,[5] or that defendants being strangers to the agreement could not be made parties to a suit for specific performance [6] None of these questions should be allowed for the first time in special appeal unless it can be decided upon the record before the Court [7] Incompetency to bring a suit,[8] or inadmissibility of a document [9] or incompetency of the arbitrators to administer other than the usual oath,[10] or any matter of law going to the root of the plaintiff's suit,[11] such as want of jurisdiction patent on the record,[12] or that there is no cause of action,[13] and the point manifestly arises out of the pleadings [14] or want of notice in a suit for ejectment of a tenant [15] or that the lower Courts have misconceived the whole case,[16] may be raised on special appeal but not limitation,[17] raised orally at the hearing as to the presentation of the respondent's appeal in the lower appellate Court [18] nor any plea not taken in the memorandum, such as the non payment of deficit stamp duty on the memorandum of appeal in the lower appellate Court within the period of limitation,[19] nor non joinder of parties,[20] nor misjoinder,[21] nor

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[1] Soorendra Nath Roy v Rughoobur Dyal (1871) 15 W R, 392

[2] Thummun v Golab Rai (1870) 2 All H C 89

[3] Nanoo Roy v Joomuck Lall Dass (1872) 18 W R 376

[4] Trilochun Doss v Gugun Chunder, (1875) 24 W R 413, (but see Ramtarak Karati v Dinanath Mandal (1871) 7 B L R 184, 24 W R, 414, note, Court of Wards v Roop Moonjuree Koocr (1876) 25 W R, 260, Ramanund Roy v Urnokalee Debea (1865) 2 W R, 257.

[5] Chomu v Umma, (1891) 14 Mad, 46

[6] Dodhu v Madhavrao (1894) 18 Bom, 110
Kanahia Lal v Suraj Kunwar, (1899) 21 All, 446

[7] Radha Kishen v Bukhtawur Lal, (1866) 1 Agra, 1

[9] Oomatool Fatima v Ghunnoo Singh, (1873) 19 W R, 22 but see, Joygopal v Thakomonee (1869) 11 W R, 381

[10] Wahulla v Ghulam Ali, (1876 7) 1 All, 535

[11] Kuppa v Dorasami (1883) 6 Mad 76

[12] Bapuji v Umedbhai, (1871) 8 Bom H C, A C J, 245, Mohan Ishwar v Haku Rupa (1880) 4 Bom, 638, Nyamtula v Nana, (1889) 13 Bom, 424.

[13] Jan Ali v Abdoor Rahaman, (1870) 14 W R, 420, Parbati Churn v Kali nath, (1870) 6 B L R, App, 73, Amrita v Nuru, (1889) 13 Bom, 489

[14] Mahammad Ismail, v Chattar Singh, (1882) 4 All, 69

[15] Abdulla v Subbarayyar, (1878-81) 2 Mad, 346, Vithu v Dhondi, (1891) 15 Bom, 407, but see, Ram Nuffer v Dhol Gobind, (1878) 1 C L R, 421, [the validity of a notice to quit may, however, be questioned for the first time in second appeal—Gauri Sankar Shah v Najabrati Hossein, (1896 7) 1 Calc, W N, clxxi] —Mahomed v Ganapati, (1890) 13 Mad, 277, p 280.

[16] Kalee Mohun v Kalee Kisto, (1869) 11 W R, 183 2 B L R, App, 39; Narayana v Muni, (1887) 10 Mad, 363

[17] Shivapa v Dod Nagaya, (1887) 11 Bom, 114

[18] Ahmad Ali v Waris Husain, (1893) 15 All, 123

[19] Ram Kishen v Dipa Upadhia, (1891) 13 All, 580

[20] Moidin Kutti v Krishnan, (1887) 10 Mad, 322

[21] Durshun v Saminah Bibee (1864) 1 W R 114 Mauli v Gulzar Singh (1894)

Chunder v Muddun Mohun, (1869) 12 W. R., 504.

defect of parties not affecting the merits of the case,[1] nor any objection to the admission of evidence other than that taken in the Court below,[2] nor any objection to the mode of recording evidence[3] nor any objection to evidence as not being the best,[4] nor any objection as to the arrest in execution of a decree,[5] nor an objection that a portion of a decree cannot be executed,[6] nor an objection as to the delay in

of jurisdiction arose[8] See "DUTY OF AN APPELLATE COURT," Order XL, r 31 Where in a suit to obtain a declaration of the plaintiff's right to be registered ... had not previously ... ion having been for ... A question of law, these findings may ... if it sets up a new ... al and not differing merely in degree[11]

Where the plaintiff in appeal to the District Court did not make it a ground of appeal that the lower Court had revived an *ex parte* decree after the proper time, he was not allowed to make it a ground of special appeal,[12] but this is a matter of discretion and the Court may allow it to be argued[13] A point of law may be raised for the first time in second appeal if it does not involve the taking of additional evidence on matters of disputed facts[14] The High Court is bound to notice an argument on a point of law raised in special appeal, even though it was not raised before that Court on a previous occasion when it passed an order of remand,[15] a point as to jurisdiction under Chota Nagpur Encumbered Estates Act has been raised and allowed in second appeal for the first time[16] An objection involving a point of law as well as of fact, if not taken in the Court below, cannot be entertained in second appeal[17] But a plea though not set out in the plaint may be taken, if the plaint did set out all the facts necessary to support the plea[18] A plaint which contains general

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1 Boydonath v Grish Chunder (1878) 3 Calc 26, otherwise if it is fatal—Ghulam Kadir v Mustakim Khan, (1896) 18 All, 109

2 Bapu v Baji (1890) 14 Bom 372 see also Wuzeer Jemadar v Noor Ali, (1869) 12 W R, 33 Lakshman v Amrit Gopal, (1900) 24 Bom 591

3 Lall Mahomed v Peer Nuzur, (1872) 18 W R, 112

4 Amulh Behiree v Ram Raj (1872) 18 W R 105.

5 Dwarka Nath v Unnoda Churn (1867) 8 W R 318

6 Goodur Sahoy v. Dhunneshur, (1880) 7 C L R, 117

7 Mokund Lall v Chotay Lall, (1884) 10 Calc, 1061

8 Azizuddin v Ramanugra, (1887) 14 Calc, 605

9 Bhikaji Baji v Pandu, (1895) 19 Bom, 43

10 Nagesh v Gururao, (1893) 17 Bom, 303

11 Rachawa v Shivayogapa, (1894) 18 Bom, 679

12 Baro Khasia v Jitu Sirdar, (1871) 8 B L R, 78, 15 W R, 315

13 Madho Pershad v Gajadhar, (1883 4) L R, 11 I. A., 186

14 Chandappa v Girimallappa, (1895) 19 Bom. 331

15 Darimba Debia v Nilmonee Singh, (1871) 15 W R, 180, but see, Jowahir Lall v Court of Wards, (1872) 17 W R., 214

16 Ajodhya v Keshub (1907) 11 Calc, W N, 1127

17 Vasanji Haribhai v Lallu Akhu, (1885) 9 Bom 285, and see Umrao v. Mahomed Rajabi, (1900) 27 Calc., 205, 4 Calc., W. N 76

18 Judoonath v Kaleekristo, (1874) 22 W. R., 73

allegations but not specific instances of fraud cannot be amended in second appeal.[1]

property as self acquired to a suit for a share of it as joint property,[9] or for pro-

under Mitakshara law,[11] from a suit based on *den mohur* (dower), to one on heirship,[12] nor unless under special circumstances, from a suit for confirmation, to one for recovery of possession,[13] nor from a suit for possession on a special title to one based on twelve years' adverse possession,[14] or on possession as an occupancy ryot,[15] but a suit to eject can be changed into a suit to redeem.[16] And where a suit was contested on the ground whether A had purchased *from* B, *the* title of B was not allowed

the broad ground that a case
he lower Courts.[18] And in all
taken in connection with the
annot be started for the first

time in special appeal.[19]

Remand.—Before remanding a case, the Court is empowered to see if there is any evidence on the record to warrant a contrary finding to that arrived at by the Judge.[20]

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1 Krishnaji v. Wamnaji (1894) 18 Bom., 144.

2 Sutyabhama v. Krishna Chunder, (1881) 6 Calc., 55.

3 Tirth ... 19 C. D., 419.

4 M ... l, 495; ...hugwan ... Nunji,

5 Gopal v. Hanmant, (1882) 6 Bom., 107.

6 Purtag Dutt v. Brojo Koonwar, (1868) 9 W. R., 503.

7 Soorjo Koomar v. Gungadhur Roy, (1869) 12 W. R., 80.

8 Hemanginee v. Pitamber Dey, (1866) 5 W. R., 197.

9 Muttusami v. Ramakrishna, (1889) 12 Mad., 292.

10 Kripa Nath v. Saroda, (1864) 1 W. R., 283.

11 Shiu Das Narayan Singh v. Bhagwan Dutt, (1868) 2 B. L. R., App., 15.

12 Umbica Churn v. Nadir Hossein, (1869) 11 W. R., 133, 2 B. L. R., A. C., 258.

13 Tenetput Singh v. Sudersan Das, (1879) 4 Calc., 46.

14 Krishna Churn v. Protab Chunder, (1881) 7 Calc., 560.

15 Brindabun Chunder v. Dhununjoy, (1880) 5 Calc., 246.

16 Sankana Kalana v. Virupakshapa, (1883) 7 Bom., 146.

17 Al... v. Sonaoollah, (1867) 8 W. R., 5.

18 Sh... v. Aoladh ... R., 174;

19 Jan Ali v. Abdoor Rahman, (1870) 14 W. R., 421.

20 Ram Pershad v. Rajunder, (1866) 6 W. R., 260; Jugdeep Narain v. Deen Dyal, (1873) 20 W. R., 174.

Neither the lower Courts nor the High Court can go behind the decision on remand. If not changed in review, it is final.[1] Findings upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined.[2]

The omission of a party to prefer an appeal against an order of remand does not preclude him from questioning its legality when it comes up in special appeal from the subsequent decision passed after remand.[3]

When a case is remanded to try a single issue, the order prevents the case being re-opened.[4]

The first Court held the suit was barred; this decision was set aside on regular appeal, and the case remanded for trial on the merits. The first Court then decreed the claim and the appellate Court dismissed it. In special appeal it was held that, though the defendant might have appealed from the first decision of the appellate Court on the question of limitation, he could raise the same objection in cross appeal on the plaintiff's special appeal.[5]

The general affirmation of a judgment in special appeal can only refer to the points raised by the appellant, and the rejection of the appeal does not necessarily affirm the other findings of fact or law incidentally arrived at by the lower Court.[6] Where the lower Court decided the issue of limitation against, but the other issues in favour of, the defendant, and the High Court remanded the case without passing any judgment on the issue of limitation, it was held that when the case came up again in special appeal, the Court could enter on the question of limitation.[7] When the lower appellate Court framed a wrong issue for decision, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court in second appeal refused to remand the case for a new finding on that issue.[8]

Error of Judge. When it is stated in special appeal that the lower Court refused to examine witnesses, it is not sufficient to put in an affidavit to the effect that a verbal request of the vakeel to examine witnesses was refused. The general practice is for the pleaders to apply for examination of witnesses by petition.[9]

When a Judge states that an admission was made before him by one of the parties to the suit, the High Court cannot in special appeal enquire whether the Judge is right or wrong in making the statement.[10]

Limits of jurisdiction of second appellate Court.—If the High Court call up a case as a regular appeal before themselves and go through the evidence, they exceed the statutory limits of their jurisdiction.[11]

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[1] Ram Kuvarbai v. Damodhar, (1869) 6 Bom. H. C., A. C. J. 146; Nursing v. Anderson, (1873) 19 W. R., 124; and see Dasaradhi v. Joddu Moni, (1882) 5 Mad., 193. But see Rokhban v. Bansi, (1884) 8 All., 172.

[2] Balkishen v. Jasoda Kuar, (1883) 7 All. 765.

[3] Magtram Ojha v. Nilmonee, (1874) 21 W. R., 326; 13 B. L. R., 198. See also Kanto Pershad v. Jagat Chandra, (1896) 23 Calc., 335, and Gauri Shankar v. Karima, (1893) 15 All., 417.

[4] Moltan Allee v. Shew Buksh, (1863) Marsh., 603; Purro Jan v. Bykunt Chunder, (1868) 9 W. R., 380.

[5] Mirza Himmat Bahadur, in the matter of, B. L. R., (F. B.,) 420; and see Dasarathi v. Joddumoni, (1882) 5 Mad., 193.

[6] Ahmed Hossein v. Bandee, (1871) 15 W. R., 91.

[7] Phool Koomaree v. Wonkar Pershad, (1867) 7 W. R., 67.

[8] Vishnu Ramchandra v. Ganesh, (1897) 21 Bom., 325.

[9] Ramessur Bhuttacharjee v. Shib Narain, (1870) 14 W. R., 419; Raj Lukhee Dabia v. Gokool Chunder, (1869-70) 13 Moo., I. A. 225, 226.

[10] Bykuntnath Goopto v. Prosunno Moyee, (1866) 5 W. R., 196.

[11] Lukhi Narain v. Jodu Nath, (1893-4) L. R., 21 I. A., 45; 21 Calc., 504.

Court-fees —In a suit upon a hypothecation bond it was *found by the* Court of first appeal that the bond and the debt secured thereby were *binding on* the first, but not upon the second defendant The plaintiff preferred a second appeal against the second defendant *Held*, that the Court *fee payable on the* second appeal should be calculated on the amount of the debt sought to be recovered [1] Where it was discovered in second appeal in the H*igh Court that* the respondent, when appellant in the lower appellate Court had not paid a *sufficient Court fee* on his memorandum of appeal in that Court, and up to date of the hearing of the appeal in the High Court, though called on to do so, had not made good the deficiency it was held that the proper procedure was not to dismiss the respondent's appeal to the lower appellate Court, but *to stay the* issuing of the decree, if any, of the High Court in favour of the respondent *until* such time as the additional Court fee due by him might be paid [2]

No appeal lies to the High Court from an order of a District Judge, *rejecting* an appeal petition as insufficiently stamped [3]

Second appeal on no other grounds

101 No second appeal shall lie except on the grounds mentioned in section 100

Act XIV of 1882, sect 585 this section applies to H C In regard to Coorg See Reg I of 1901, ss 11 and 12

No second appeal in certain suits

102. No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed five hundred rupees

Act XIV of 1882, sect 586 This section applies to H C [4]

Practice in appeal —If in appeal it appears that there is a Small Cause Court in the place where the suit was instituted, and it was filed in the ordinary Court, the proceedings will be set aside as without jurisdiction and the plaint returned [5]

Right to begin —The appellant begins, even where his right of appeal is contested [6]

Cognizable by Court of Small Causes —The law *now in force in* regard to Provincial Courts of Small Causes is Act IX of 1887

No special appeal lies in a suit cognizable by a Small Cause Court, though a question of title to immoveable property has been raised and tried in it [7]

The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes or give a right of second appeal By merely asking in the alternative for an account of profits, a suit cognizable by a

[1] Ramasami v Subbasami (1890) 13 Mad , 508

[2] Narain Singh v Chaturbhuj Singh, (1898) 20 All , 362 See also, Valambal Ammal v Vithilinga, (1901) 24 Mad , 331

[3] Venkatarayadu v Rangayya, (1898) 21 Mad , 162

[4] Act XXIII of 1861, s 27 This section applies to H C It is not in force in the Andaman and Nicobar Islands—Reg I of 1884, s. 4, and has been modified in Coorg, Reg I of 1901, s 12

[5] Kalian Dayal v Kalian, (1885) 9 Bom , 269

[6] Rustomji v Kessowji Naik (1884) 8 Bom , 287, 293

[7] Mohesh Mahto v Piru, (1879) 2 Calc , 470 , Sunkar Lall v Ram Kalee, (1872) 18 W R , 104 , but see Pachoo v Gooroo Churn, (1871) 15 W R 506 , Lukhynarain v Gorachand, (1883) 9 Calc , 116 , Manappa v McCarthy (1878 81) 3 Mad , 192

Small Cause Court cannot be converted into one of a different nature,[1] and the addition of an unnecessary prayer for a declaration does not prevent a suit being of a Small Cause Court nature [2]

It is the nature of the suit and not the Court in which it is tried that determines the appeal [3] So that if a case is of a Small Cause Court nature, though for special reasons it cannot or has not been tried in a Small Cause Court no appeal lies [4] A suit of the nature cognizable by a Small Cause Court does not cease to be so within the meaning of this section, because the Court in which it was instituted under s 23, Act IX of 1887, returned the plaint to be filed on the regular side on the ground that the suit involved questions of title [5] A suit to recover from the decree holder money paid as the price of property sold in execution of a decree as the property of the judgment debtors, on the ground that the judgment debtors had no saleable interest in the property, is a suit of the nature cognizable in Courts of Small Causes [6]

Appeal does not lie—No special appeal lies in a suit for contribution under s 69 of the Indian Contract Act, where the parties are not sharers in joint property,[7] nor on a bond specially registered under s 53, Act XX of 1866 for an amount less than 500 rupees,[8] nor for rent not exceeding Rs 500,[9] nor in a suit for damages below Rs 500 whether the damages are on account of moveable or immoveable property [10] nor for sale of a decree for an inadequate amount [11] nor for damages for detention of materials of a house,[12] nor in a suit for money paid by an unsuccessful claimant to attached property in order to save his share from sale in execution [13] nor in a suit not for money but to redeem a mortgage,[14] nor in a suit to recover a share of *malikana* realised from the Collector [15] nor in a suit to have property made over to plaintiff on an account [16] nor in a suit for recovery of money paid in excess of rent due [17] nor of share of profits of land,[18] nor in a suit for refund of excess revenue paid by a lessee [19] nor in a suit against Government

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[1] Narayan v Balaji (1897) 21 Bom 248 See Vinayak v Krishnarao (1901) 25 Bom 625

[2] Ramachendraiyar v Norulla (1907) 30 Mad 101

[3] Kalian Dayal v Kalian, (1885) 9 Bom 299 Mahadeb v Budhai Ram (1905) 27 All 358

[4] Id Musa Miya v Sayad Gulam (1883) 7 Bom 160 Harakh v Ram Sarup (1890) 12 All, 579 Muttukaruppan v Sellan, (1892) 15 Mad, 98, Annamala v Subramanyan (1892) 15 Mad 298

[5] Muttukaruppan v Sellan (1892) 15 Mad 98 Kali Krishna v Izzatunnissa (1897) 24 Calc, 557, Sada Shankar v Brij Mohan (1898) 20 All 480

[6] Makund Ram v Bodh Kishen, (1898) 20 All 80, but see contra Pachaiyappan v Narayana, (1888) 11 Mad 269

[7] Srinivasa v Sivakolundo (1889) 12 Mad, 349, see also Krishno Kamini v Gopi Mohan, (1888) 15 Calc 652

[8] Sri Bullow v Baburam (1885) 11 Calc, 163

[9] Rango Roy v Holloway, (1899) 26 Calc, 842, (1899 1900) 4 Calc W N, 95.

[10] Bheenuck Lall v. Rung Lall, (1869) 11 W R., 369 Gopeenath v. George, (1866) 6 W R, 7, Luckee Debia v Malick, W. R, (1864), 237

[11] Kristomonee v Bishambhur, (1866) 5 W R, 215

[12] Keshub v Brommomoyee, (1864) 1 W R. 35.

[13] Poorsuttum v Gour Soondur, (1872) 18 W R, 283, see also, Krishna Kishore, Bireshur, (1879) 4 Calc, 595

[14] Khuleel Mahomed v Furzam Ally, (1869) 12 W R 269

[15] Rasmonee v. Mahomed Hafizulla, (1869) 3 B L R, App 96, 12 W R, 29

[16] Balloo v Ramsurun, (1876) 25 W R, 234

[17] Sib Sahaya v. Birchandra, (1868-9) 2 B L R, A C, 172; 11 W. R, 30

[18] Joy Narain v Muddoosoodun, (1865) 2 W R, 134

[19] White v Tripura Sunkur, (1864) W. R., 297.

for recovery of money in the hands of a Nazir stolen from Court,[1] nor in a suit for the materials of a hut or their value,[2] nor in a suit to recover possession of a share of a boat by establishing plaintiff's right,[3] nor in a suit for damages for value of crops misappropriated, the claim being under Rs 500,[4] nor in a suit by an heir for personal property valued at Rs 200, said to have been taken from his ancestor[5] nor by some members of a caste to compel other members to deliver caste vessels to the caste priest,[6] nor in a suit for n cut and taken away,[7] money recovered by a r money not exceeding the collections,[10] nor in a suit for mesne profits[11] nor for compensation for money realized by the defendants from the actual occupants of land said to be plaintiff's tenants, even Cause Court under s 23 Act IX of ie ground that the suit involved a int where there is an *alternative* although raising a question of title nor in a suit for rent other than house rent where the amount or value of the suit does not exceed five hundred rupees,[15] nor in a suit for the enforcement of the terms of a *muchilka*[16] If the parties have submitted to the jurisdiction it is not open to either of them on second appeal to plead want of jurisdiction[17] *Kittubah* and *Jarmims* emoluments are neither a charge on nor interests in, immoveable property no second appeal lies in a suit for arrears of such charges[18] A suit not exceeding Rs 500 in value was brought in a Court exercising jurisdiction as a Court of Small Causes That Court passed a decree and transferred it for execution to

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[1] Collector of Tipperah v Mafizunnissa (1869 70) 4 B L R, App 46

[2] Kashee Chunder v Judoo Nath (1868) 10 W R, 29

[3] Mahomed Azim v Mahomed Somee (1874) 21 W R 413

[4] Hedactoollah v Kailoo (1867) 7 W R 73 Ram Dyal v Huro Soondurec, 10 W R 272 Shib Deen v Bukshee Ram W R (1864) Mis 3

[5] Kapalee Bowah v Keshram Kooch (1869) 11 W R 95 2 B L R, App, 23

[6] Kalian Dayal v Kalian (1885) 9 Bom 259

[7] Krishna Prosad v Moizuddin (1890) 17 Calc, 707 but see, Dewan Roy v Sundar Tewary (1897) 24 Calc 163

[8] Muhamdi Bega
(1882) 4 All
Singh v Ch
Nath (1873) 20 W R 4

[9] Debi Das v Lachman Singh (1885) 7 All, 806, and see Asman Singh v Doorga Roy (1881) 6 Calc 284

[10] Ali Ahmed v Oodhraj Ram (1868) 10 W R 79

[11] Kunjo Behary Singh v Madhub Chundra Ghose (1896) 23 Calc 884 [overr
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[12]

[13] Hurri Narain v Joy Durga (1878) 2 C L R, 17 Rash Behari Pal v Sridhar Belal (1881) 6 Calc W N 687

[14] Vinayak v Krishnarao (1901) 25 Bom 625

[15] Soundiram Ayyar v Sennia Naickan (1900) 23 Mad. 547.

[16] Harish Chandra Deo v Narayana (1901) 24 Mad., 508

[17] Suresh Chunder Maitra v Kristo Rangini Dasi, (1894) 21 Calc 249 Parameshwar v Vishnu (1904) 27 Mad, 478.

[18] Mullapudi v Venkatanarasimha, (1896) 19 Mad., 329

the Munsif. The Munsif passed an order in execution which was confirmed in appeal. *Held* no second appeal lay.[3] A suit brought to recover moneys wrongly made over by a Magistrate under s. 517, Cr. P. C. is a suit of a Small Cause nature, and if the amount claimed is less than Rs. 500, no second appeal lies.[4] A suit to recover possession of books and for money collected by the defendant on behalf of the plaintiff is of a Small Cause Court nature.[5]

Appeal lies.—A special appeal lies from a decree on a mortgage bond for an amount under Rs. 500, if the property is made liable,[6] or in a suit to recover a debt from immoveable property,[7] or in a suit by the assignee of a registered mortgage bond hypothecating certain crops to enforce the hypothecation.[8] A second appeal lies in a suit for recovery of arrears of *malikana* allowance,[9] but where A sued for Rs. 500 on a bond and the suit was decreed by consent, and the decree holder got 1½ *beegahs* of land instead of money, it was held that this did not change the nature of the suit so as to give an appeal.[8] A special appeal will lie from a decree for possession of six decrees valued at less than Rs. 500, with a declaration of power to execute them,[9] and where plaintiff sued father and sons on a bond executed by the father alone, the sons were allowed to appeal.[10]

A suit for damages on account of withholding a receipt for agricultural rent is not within the section.[11] A second appeal lies in a suit for arrears of *choukidari tax*.[12] A second appeal will lie in a suit for money paid to redeem crops distrained by the defendants for rents due from others than the plaintiffs and for damages sustained on account of the distraint.[13] A suit for specific performance of a contract not being cognizable by a Court of Small Causes, a special appeal will lie.[14] Similarly a special appeal lies in a suit to establish a surety's liability for rent due from a *putnidar*.[15] A suit for compensation for illegal distress or attachment and not for the recovery of specific property is not a suit of the value cognizable by a Court of Small Causes, and a second appeal will lie.[16]

Any suit.—This section applies to a suit on an award filed in Court,[17] and to proceedings in execution,[18] but not where the matter in dispute in the

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[3] Kandha Pershad v. Lal Behari Lal (1898) 25 Calc. 872; Harakh v. Ram Sarup (1890) 12 All. 97. And see Shyama Charan Mitter v. Debendra (1900) 27 Calc. 484. Followed in Narayan v. Nagendas (1906) 30 Bom. 113, 7 Bom. L. R., 641.

[4] Moti Lall Ghose v. Secretary of State, (1905) 9 Calc. W. N. 495, 1 Calc. L. J. 300.

[5] Hunsraj v. Ratni (1905) 27 All. 205.

[6] Tripoora Soondur v. Koylash Chunder Bose, (1871) 15 W. R. 265.

[7] Atmaram v. Sadashiv (1864-66) 2 Bom. H. C. 1.

[8] Kalka Prasad v. Chandan Singh (1888) 10 All. 20.

[7] Churaman v. Lalli (1887) 9 All. 591.

[8] Tahun Bibee v. Tenoo Bibee (1871) 15 W. R. 65.

[9] Lalam Das v. Dwarka Das (1875) 7 All. H. C. 88; Debakee Nundun v. Madhoo Muttee, (1875) 24 W. R., 478, 1 Calc. 123.

[10] Narasinga v. Subba, (1889) 12 Mad., 130.

[11] Shojlendro Giri v. Iatoo Doss, (1875) 23 W. R. 304.

[12] Assanulla v. Tirthabashini, (1895) 22 Calc., 680.

[13] Dewan Roy v. Sundar Tewary, (1897) 24 Calc. 163.

[14] Nilkanth v. Bhuban Bishee, (1866) 6 W. R. 322.

[15] Mahatab Chand v. Brojonath, (1867) 8 W. R. 111.

[16] Pama Sanyasi v. Zamindar of Jeypur, (1902) 25 Mad., 540.

[17] Banoo v. Narain Sahoo, (1870) 13 W. R., 233, 4 B. L. R., App., 82.

[18] Sri Bullov v. Baburam, (1885) 11 Calc., 169; Atthala v. Subbanna (1888) 12 Mad., 116; Harakh v. Ram Sarup, (1890) 12 All., 579.

original suit exceeded 500 rupees[1] If the order is a decree of a Small Cause Court nature, no special appeal lies[2]

not t ... s, and
ing a ... mand-
Caus ... Small
it[4] ... on for
... Court
suit w ... given under ss 104 and 106[5] No second appeal lies against an order under the Succession Certificate Act[6]

103 In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal but not determined by the lower appellate Court.

Power of High Court to determine issues of fact

This is a new section giving authority to the High Court in explicit terms to deal with questions of fact arising upon the record and left undecided by the lower appellate Court

This will, in some cases, prevent the necessity of remanding for re trial[7]

APPEALS FROM ORDERS.

104 (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders —

Orders from which appeal lies.

(*a*) an order superseding an arbitration where the award has not been completed within the period allowed by the Court,

(*b*) an order on an award stated in the form of a special case,

(*c*) an order modifying or correcting an award,

(*d*) an order filing or refusing to file an agreement to refer to arbitration,

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[1] Nazir Husain v Kesri Mal (1890) 12 All, 581

[2] Perumal v Venkatarama, (1888) 11 Mad, 130

[3] Collector of Bijnor v Jafar Ali, (1880 81) 3 All, 18

[4] Gyanund Asram v Bepin Mohun, (1895) 22 Calc, 734, Kutte Mohaldar v Ramjan, (1884) 10 Calc, 523, Chinnatambi v Chinnana, (1896) 19 Mad, 391.

[5] Mahadev ... (1884) 8 Bom, ... But see, Aithala ... 885) 11 Calc, 1 ... 1 Calc W N

[6] Subba Rao v Palaniandi, (1894) 17 Mad, 167

[7] Some of the older reported cases seem to show that the Courts have exercised powers somewhat similar to that here given See notes to section 100 *ante*, *vide* PRACTICE

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration,

(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court;

(g) an order under section 95,

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree,

(i) any order made under rules from which an appeal is expressly allowed by rules

(2) No appeal shall lie from any order passed in appeal under this section

Act XIV of 1882 sec 588, 2nd para, 36 and 37 Vict c 66 s 19 (Ind Act 1873) This section applies to H C

The orders expressly referred to in this section relate only to arbitration and arrests or attachment but clause (h) saves an appeal from all orders made under the Rules of Part II from which an appeal is provided in the rules themselves

Order XLIII rule 1 contains a list of the orders from which appeals are already granted by the Rules drawn up by the framers of the Code

(a) *An order superseding an arbitration*—See schedule II sect 8 which reproduces sect 514 of Act XIV of 1882 from which an appeal was allowed

(b) *An order on an award in special case*—See schedule II, sect 11 which reproduces sect 517 of Act XIV of 1882

(c) *An order modifying or correcting an award*—See schedule II sect 12 which reproduces sect 518 of Act XIV of 1882 from which an appeal was allowed

(d) *An order filing or refusing to file an agreement to refer*—See schedule II sect 17 which reproduces sect 523 of Act XIV of 1882 from which it was doubtful whether an appeal lay Sect 17 of schedule II makes it clear that the Court does not pass a *decree* but makes an *order* under this section so that an appeal lies only by virtue of this sub section [1]

(e) *An order staying or refusing to stay etc*—See schedule II, sect 18 and sect 19 of Act IX of 1899

(f) *An order filing or refusing to file an award*—See schedule II, sec 20, reproducing sect 525 of Act XIV of 1882 from which an appeal lay as from a decree [2]

(g) *An order under section 95*—Section 95 reproduces section 491 from which no appeal lay and section 497 from which an appeal was given by sect 588 of Act XIV of 1882

(h) *Order imposing fines or directing arrest* [3]—Sect 588 (29) of Act XIV of 1882

[1] See Report of Special Committee

[2] Mahomed Wahiduddin v Hakiman (1898) 25 Calc., 757, 2 C W N, 129 etc

[3] Where an order is made by a District Court in Lower Burmah in exercise of the jurisdiction of a Court of Small Causes an appeal lies therefrom to the Chief Court of Lower Burmah sec 38 (2) of the Lower Burmah Courts Act, 1900 (VI of 1900) Note Legislative Department

Under s 24, Act IX of 1887, an appeal lies from an order passed under this section by a Provincial Small Cause Court to the District Judge

An order enforcing a penalty under the Stamp Act is not appealable under this section [1] This section does not apply to attachment for contempt [2]

(*i*) *Orders made under rules* —See Order XLIII, *post.*

This section has the effect of restricting appeals in the case of orders which are not ... decree ... execution and therefore a the full C ... Judge an appeal lies to a single ... rder passed on appeal by that sec 588, (former Code), did not apply where the appeal was from one of the ... the Calcutta High Court Judges of the High Court to another divi ... restrict the right of appeal conferred by s

... appellate Court No appeal ... s 15 [6]

... are only appeals from ... nd upon matters aris-

An order under s 5 of the Court Fees Act is not within this section [7]

... cution [8] ... Act [9] or ... under ... make a ... eration ... appeal ... s in a

[1] Sonaka v Bhoobunjoo, (1880) 5 Calc , 311

[2] Navivahoo v Narotam Das, (1883) 7 Bom , 5

[3] Vasudeva v Visvaraja, (1897) 20 Mad , 407 , approved in, Toolsimoney v. Sadevi, (1899) 26 Calc , 361, 3 Calc W N , 347

[4] Sankaran v Raman Kutti, (1897) 20 Mad , 152

[5] Toolsimoney Dassee v Sudevi Dassee, (1899) 3 Calc W N , 347 , 26 Calc , 361. In this case several earlier decisions were considered and overruled amongst them the following Madras case where it had been held that the correspond ... chaya v ... v of one ... *pauperis* ... , (1886) 9 ... 16 Calc ... Council ... d time to ... But an appeal always lay from an order committing for contempt Navivahoo v. Narotam Das, (1883) 7 Bom , 5 , and see Muhammad v Asanulhah, (1892) 14 All , p 231.

[6] ... aja, (1897)

[7]

[8] ... Hazra, in

[9] Sonaka Chowdhrain v Bhoobunjoy, (1880) 5 Calc , 311

[10] Sreeram Chunder v Mulhoo Soodun, (1875) 24 W. R , 17 , see also (1873) 19 W R , 122.

[11] Pran Kisto Deo v Kalee Doss, (1867) 7 W. R., 460.

[12] Khettramoni v Shyama Churn, (1894) 21 Calc, 539.

[13] Gangadhur v Shivlingrao, (1900) 24 Bom , 93.

second appeal from a decree, the finding of fact arrived at by the lower appellate Court [1]

Where on remand from the High Court for trial, the Judge considered him self bound to carry out the orders although the parties petitioned that they had entered into a compromise before the appeal, it was held that an appeal did not lie [2]

No second appeal —No second appeal lies from an order by a District Judge on appeal setting aside a sale under O XXI, r 72, notwithstanding that s 244 former Code (sec 47) bars a separate suit in such a case[3] nor *from* an order of an appellate Court under s 312 (O XXI r 92) confirming a sale [4]

Other orders

105 (*1*) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal

(*2*) Notwithstanding anything contained in sub section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness

Act XIV of 1882 section 591 This section applies to H C

Error, defect or irregularity —These mean an error, defect or irregularity in procedure or law and not in matters of fact [5]

Affecting the decision of the case —These words mean "affecting the decision of the case with reference to the merits of it" When an *ex parte* decree was set aside by an order under s 108, former Code (Order IX, r 13) and the suit heard upon the merits and dismissed *held* that such order was not an order affecting the decision of the case and was not appealable [6] An order re admitting an appeal which has been dismissed for default is not an order affecting the decision of the case [7]

Attachment —An order of attachment for contempt on the Original Side of the High Court does not fall within this section, and is appealable [8]

Court-Fees —A decision under s 5 of the Court Fees Act is not an order under this section [9]

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[3] Bhagbut Lall v Narku Roy, (1894) 21 Calc, 789

[4] (1891) 18 Calc, 422 Gopal ... ya Dassi v Padmo Lochun Mondul,

[6] Chintamony Dassi v ... th Sahoo, (1895) 22 Calc, 981, Tasadaq Hussain v Hayatun ...) 25 All, 25 ...

[7] Gulab Kunwar v Thak... 24 All, ...

[8] Navnabhoy v Narotam ... 5

[9] Balkar ... Gobind ...

Interlocutory orders—There is no law in India which renders it imperative upon a party to appeal from every interlocutory order under the penalty, if he does not do so, of forfeiting the benefit of the consideration of the appellate Court and whether the order is subject to appeal or not, the party aggrieved can impugn it in an appeal from the decree [1]

The present effect of this judgment has been considerably curtailed by the introduction of preliminary *decrees* as to which see section 2 *ante* and the words must now be read as referring only to '*orders*' in their strictest sense as opposed to preliminary decrees [2]

Remand—Sub section (2) takes away from this section all orders of remand from which an appeal lies, if these are to be questioned, the appeal must be made at once [3] The provisions as to appeals from these orders are contained in Order XLIII, r 1 (u) *post*

Second appeal—Under Act XIV of 1882 it was held that no second appeal lay from an order admitting a review, after the case had been struck off for default of prosecution and a re hearing had been refused [6] or from an order ... the order ... judgment ... nd appeal against ...

Letters Patent—Art 15 of the Letters Patent is not restricted by these provisions [9]

[1] Moheshur Sing v Bengal Govt (1859) 7 Moo, I A 289 followed in (1863 6) 10 Moo I A pp 340 413 (1867 9) 12 Moo I A 157 (1881) 7 Cal, 148, (1887) 9 All 447 (1888) 10 All 97 (1890) 14 Bom, 232 and many other cases

[2] The following or ... XIV of 1882 ... adjudication at ... 725 (1902) 2 ... made in partition and partnership suits would clearly be decrees under this Code An order nominating arbitrators—Sheonath v Ramnath, (1863 6) 10 Moo I A, 423 an order admitting an appeal after time —Mowree Bowa v Soorundurnath Roy, (1868) 10 W R, 178, and an order granting a review—Joy Kishen, Mookerjee v Parbutty Charn Ghosal, (1874) 22 W R, 183, Bhyrub Chunder v Madhab Ram, (1873) 20 W R, 84, an order declaring the liability of the defendants for mesne profits passed in the course of execution proceedings—Goda vari v Gojapati, (1900) 23 Mad, 494, and even an order refusing to set aside an ex *parte* decree—Luckmidas v Ibrahim, (1878) 2 Bom, 644, have been impeached in appeal from decree, but as to this last decision see Tassadiq Hussain v Hayatunnissa, (1903) 25 All, 280, ... g of an account ... nd an order was ... *held*, that the ... ny error in it ... ecree—Jamsetji ... 18 Mad, 421; (1901)

[3] This effects a change in the law See, Moheswar Singh v Bengal Govt (*Supra*), Savitri v Ramji (1890) 14 Bom, 232, and Forbes v. Ameeroonissa (1863 66) 10 Moo I A 340.

[6] Hurdhamun v Jingboor, (1880) 5 Calc., 711

What Courts to hear appeal.

106 Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court

Act XIV of 1882, sect 589 This section applies to H C The last para of sect 589 relating to appeals in insolvency matters has been omitted See the new Insolvency Act

When an order is made by the lower Court of appeal returning a plaint under O VII, r 7 by virtue of its powers under s 107, an appeal lies to the High Court under this section [1]

Appellate Jurisdiction —See *Kirte Mohaldar v Ramjan* [2] A District Judge has no jurisdiction to hear an appeal fr in a case where it has no jurisd ction to when the subject matter of the suit is more th subject matter of the suit is above Rs 5000 applicat on for a receiver under Order XL of the Code lies to the High Court [4] but this has been dissented from in Bombay and Allahabad [5]

GENERAL PROVISIONS RELATING TO APPEALS

Powers of Appellate Court

107 (*1*) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

(*a*) to determine a case finally,

(*b*) to remand a case

(*c*) to frame issues and refer them for trial,

(*d*) to take additional evidence or to require such evidence to be taken

(*2*) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein

Act XIV of 1882, sect 582 This section applies to H C This is a general provision setting out in the body of the Code the powers of an Appellate Court

As nearly as may be —Under the former Code it was held that the corresponding section did not make the provisions for substituting or adding plaintiffs

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[1] Goor Bux v Brij Lal Banka (1899) 26 Calc, 275, 3 Calc W N, 243

[2] Kirte Mohaldar v Ramjan, (1884) 10 Calc, 523

[3] Venkatrayer v Jamboo Ayyan (1894) 17 Mad, 377

[4] Boidya Nath v Makhan Lal (1890) 17 Calc, 680

[5] Manikshah Sorabji v Dadabhai Jamshetji, (1903) 27 Bom, 604, and Debi Prasad v Jamna Das, (1901) 23 All, 56

(see Order I, r 10) applicable to appeals,[1] but that the continuation of suits by assignees and representatives and the provisions of Order XXII, rr 4, 5 and 6,[2] do apply to appeals by virtue of these words [3]

An appellate Court can, with consent of parties refer a case to arbitration,[4]

had disposed of the case,[11] or pass a decree in terms of an award [12]

This section does not justify a Judge, hearing an appeal *ex parte*, in travelling beyond the case set up *in appeal and opening up the whole case*,[13] or to allow in appeal an amendment of a plaint, which materially transforms the nature of the claim [14] but the appellate Court has power to amend a plaint where the object is merely to seek relief ancillary to the principal prayer of the plaint and by which amendment the character of the suit is not altered [15]

Co appellant —There is no power in the Code to make a party to a suit a co plaintiff The section read with s 32 former Code (Order I) empowers the Court to strike out parties or direct new parties to be added [16]

Costs —The appellate Court can award costs to the respondent, when an appeal abates [1]

Death of respondent before judgment —See Order XXII, r 8

pass a decree for a larger amount than that claimed in the memorandum of appeal,

[1] Dwarka Nath v Debendra Nath (1899) 4 Calc W N 58

[2] Muhammad Hosain v Khushalo (1888) 10 All 223

[3] Durga Prasad *in re* (1900) 22 All, 231

[4] Sargaral Ram Pillai petitioner (1878 81) 3 Mad 78 Bhugwan Dass v Nand Lal (1886) 12 Calc 173 Suresh Chunder v Ambica Churn, (1882) 8 Calc 507

[5] Roy Sooltan v Laloo Kooer (1872) 17 W R, 300

[6] Sheo Dyal Singh v Hodgkinson, (1875) 24 W R 342

[7] Showdaminee Dossee v Ram Roodro (1867) 8 W R, 367

[8] Court of Wards v Gaya Prosad (1879) 2 All 107, see, however Ranjit Singh v Sheo Prasad (1880) 2 All 487

[9] Watson & Co v Shirro Moyee (1868) 9 W R, 259

[10] Shoroop Chunder v Mothoor Mohun (1865) 4 W R, 109

[11] Mohidei v Ram Kishen, (1885) 7 All, 528

[12] Naurang Singh v Sadapal Singh, (1888) 10 All, 5

[13] Durga Prasad v Khairati, (1876 8) 1 All, 545

[14] Majirajba v Magan Lal Bhat bhaskar (1895) 19 Bom 303 Abdul Gafoor v Nur Banu, (1868) 1 B L R, 78, (1868) 10 W R 111

[15] Peary Mohan v Narendra Krishna, (1900) 5 Calc W N 273, Umrao Begum v Irshad Husain (1894) 21 Calc 997 L R, 21 I A, 163

[16] Vasudev v Salubai (1886) 10 Bom, 227

[17] Lakshmibai v Balkrishna, (1880) 4 Bom, 654, Rajmonee Dabee v Chunder Kant, (1882) 8 Calc 440

[18] Balkaran v Gobind Nath, (1890) 12 All 129 p. 152

[19] Lukhun Chunder v Khoda Buksh, (1892) 19 Calc., 272

What Courts to hear appeal.

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Act XIV of 1882, sect 589 This section applies to H C The last para of sect 589 relating to appeals in insolvency matters has been omitted See the new Insolvency Act

When an order is made by the lower Court of appeal returning a plaint under O VII, r 7 by virtue of its powers under s 107, an appeal lies to the High Court under this section [1]

Appellate Jurisdiction—See *Kirte Mohaldar* v *Ramjan* [2] A District Judge has no jurisdiction to hear an appeal from an order in insolvency-matters in a case where it has no jurisdiction to hear an appeal in the suit itself, as when the subject matter of the suit is more than Rs 5 000 in value [3] When the subject matter of the suit is above Rs 5000, an appeal from an order rejecting an application for a receiver under Order XL of the Code lies to the High Court, [4] but this has been dissented from in Bombay and Allahabad [5]

GENERAL PROVISIONS RELATING TO APPEALS.

Powers of Appellate Court

107. (*1*) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

(*a*) to determine a case finally,

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(*c*) to frame issues and refer them for trial;

(*d*) to take additional evidence or to require such evidence to be taken

(*2*) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

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As nearly as may be—Under the former Code it was held that the corresponding section did not make the provisions for substituting or adding plaintiffs

[1] Goor Bux v Brij Lal Benka, (1899) 26 Calc, 275, 3 Calc W N, 243

[2] Kirte Mohaldar v Ramjan, (1884) 10 Calc, 523

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[4] Boidya Nath v Makhan Lal, (1890) 17 Calc., 680.

[5] Manikshah Sorabji v. Dadabhai Jamshetji, (1903) 27 Bom, 604, and Debi Prasad v. Jamna Das, (1901) 23 All, 56.

ontinuation of suits by XXII, rr 4, 5 and 6,[2]

An appellate Court can, with consent of parties refer a case to arbitration,[4] direct a local investigation, but not by the Judge against whose decree the appeal has been filed,[5] or send for the Ameen and examine him,[6] or add a respondent to the record,[7] or any party even after the period of limitation prescribed for an appeal,[8] a person cannot claim to be added as of right,[9] or separate suits misjoined, and try them,[10] or levy a stamp on the memorandum of appeal, after it had disposed of the case,[11] or pass a decree in terms of an award[12]

This section does not justify a Judge, hearing an appeal *ex parte*, in travelling beyond the case set up in appeal and opening up the whole case,[13] or to allow in appeal an amendment of a plaint, which materially transforms the nature of the claim,[14] but the appellate Court has power to amend a plaint where the object is merely to seek relief ancillary to the principal prayer of the plaint and by which amendment the character of the suit is not altered[15]

Co-appellant —There is no power in the Code to make a party to a suit a co plaintiff The section, read with s 32, former Code, (Order I) empowers the Court to strike out parties or direct new parties to be added[16]

Costs —The appellate Court can award costs to the respondent, when an appeal abates[17]

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pass a decree for a larger amount than that claimed in the memorandum of appeal,

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[2] Muhammad Hosain v Khushalo, (1888) 10 All, 223

[3] Durga Prasad *in re* (1900) 22 All, 231

[4] Sangaralingam Pillai, petitioner (1878 81) 3 Mad, 78, Bhugwan Dass v Nand Lal, (1886) 12 Calc, 173 Suresh Chunder v Ambica Churn, (1882) 8 Calc 507

[5] Roy Sooltan v Laloo Kooer, (1872) 17 W R, 300

[6] Sheo Dyal Singh v Hodgkinson, (1875) 24 W. R., 342

[7] Showdaminee Dossee v Ram Roodro, (1867) 8 W R, 367

[8] Court of Wards v Gaya Prosad, (1879) 2 All, 107, see, however, Ranjit Singh v Sheo Prasad, (1880) 2 All 487

[9] Watson & Co v Sharno Moyee, (1868) 9 W R, 259

[10] Shoroop Chunder v Mothoor Mohun, (1865) 4 W R, 109

[11] Mohadei v Ram Kishen, (1885) 7 All, 528

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[13] Durga Prasad v Khairati, (1876 8) 1 All, 545.

[14] Majiqajba v Magan Lal Bhaishankar, (1895) 19 Bom, 303, Abdul Gafoor v Nur Banu, (1868) 1 B L R, 78; (1868) 10 W. R, 111

[15] Peary Mohan v Narendra Krishna, (1900) 5 Calc W N, 273, Umrao Begum v Irshad Husain, (1894) 21 Calc 997 L. R, 21 I A, 163

[16] Vasudev v Salubai, (1886) 10 Bom, 227

[17] Lakshmibai v Balkrishna, (1880) 4 Bom, 654, Rajmonee Dibee v. Ch Kant, (1882) 8 Calc. 440

[18] Balkaran v Gobind Nath, (1890) 12 All, 129 p 152.

[19] Lukhun Chunder v Khoda Buksh, (1892) 19 Calc, 272.

unless before the judgment is pronounced an amendment of the memorandum of appeal is allowed and an additional Court fee paid in [1]

Powers —The word powers is not used in the sense of jurisdiction It means powers to grant time to adjourn a hearing to examine parties and pleaders to award costs &c [2] and to allow a case to be withdrawn [3] On appeal from the decision of a District Munsif in favour of a plaintiff in a suit for recovery of rent the District Judge set aside the decree of the lower Court, ordered a new trial and ordered the amendment of the plaint by inserting the exact boundaries of the land on which the plaintiff claimed the rent *Held*, that the order for the amendment of the plaint was bad as there was no dispute as to the boundaries of the land before the original Court [4]

Abatement —See Order XXII

Procedure in appeals from appellate decrees and orders

108 The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

(*a*) from appellate decrees, and

(*b*) from orders made under this Code or under any special or local law in which a different procedure is not provided

Act XIV of 1882 secs 587 590

In connection with this provision the wider scope given in regard to the joinder of parties and causes of action by section 99 should be particularly noticed

As far as may be —This means as far as is consistent with the principles on which appeals from original decrees are admitted and determined [5]

The appellate Court in special appeal can remand a case for re trial,[6] or for a finding on an issue [7] it cannot try an issue of fact as in regular appeal [8]

Execution proceedings —When the original suit is a suit of the nature cognizable in Courts of Small Causes and the subject matter does not exceed Rs 500 in value no second appeal will lie in respect of an order made in execution proceedings relating thereto [9]

APPEALS TO THE KING IN COUNCIL

When appeals lie to King in Council

109 Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of

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[1] Percival v Collector of Chittagong (1903) 30 Calc, 516

[2] Rabkrishna v. Harihar, (1868) 1 B L R, 156, p 163

[3] Gangaram v Data Ram, (1886) 8 All, 82

[4] Krishnaya v Pauchu (1894) 17 Mad, 187

[5] Hinde v Brayan, (1883) 7 Mad., 52, not followed in Beni Pershad v Nand Lal, (1897) 24 Calc, 93, and see Ganesh v. Bhikaji, (1886) 10 Bom, 308, Sobawan v Babu Nand, (1887) 9 All, 26, p 29

[6] Wazeer Ali v Kalee Coomar Chuckerbutty, (1869) 11 W R, 228

[7] Ram Lall v Mohurput Roy, (1874) 21 W R, 52

[8] Hinde v Brayan (1884) 7 Mad 52 Sheo Ratan v Lappu Kuar, (1883) 5 All, 14 And see, (1884) 7 Mad, 53, (1886) 12 Calc., 37, (1887) 9 All. H C, 147

[9] Ram Dayal v Patrakhan (1896) 18 All, 481, (1890) 12 All, 579 Sri Ballov v Labhram (1885) 11 Calc, 169, Aithala v Subanna, (1890) 12 Mad, 116

British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Act XIV of 1882, sect. 595.

The main provisions relating to these appeals have been retained in the body of the Code, and the balance will be found in Order XLV *post*.

The words 'Decree or final order' have been substituted for the final decree of the former section. This makes it clear that preliminary decrees are included, and *interlocutory* orders only excluded from this right of appeal.

Right to admit. This Code does not limit the prerogative of the Crown to admit an appeal.[1]

Effect of decree under appeal.—Pending the result of an appeal to the Privy Council, the person who, subject to that appeal, is the owner of the estate can sue third parties in that character.[2]

When and when not appeal lies.—No appeal is allowed as to costs,[3] nor from a criminal case,[4] unless certified by the High Court, nor from an order directing accounts to be taken in a particular manner,[5] nor from an order cancelling on the ground of mistake a notification declaring that a person had been enrolled as a pleader,[6] nor from an order under s. 26, cl. (2) of Bengal Regulation V of 1831 dismissing a Munsiff for corruption as Judge.[7] Nor from the report of a commission appointed to advise the Government of India as to an act of State.[8]

An appeal lies from the order of a single Judge of the High Court, on the appellate Side, as to the interpretation of a Privy Council decree for more than Rs. 10,000.[9]

No appeal lies to the Calcutta High Court from a final decree passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction, where the subject matter of the suit is above ten thousand rupees, but an appeal lies to His Majesty in Council.[10]

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1 Rahimbhoy v. Turner (1891) 15 Bom., 155.
2 Perhlad Sein v. Budhoo Singh, (1869) 12 W. R. P. C., 6, p. 20.
3 Keemeo Baee v. Luchmun Das, (1866) 5 W. R., P. C., 59.
4 Joykissen Mookerjee, (1864) petitioner 1 W. R., P. C., 13; Gangadhur Tilak v. Queen Empress (1897-8) L. R., 25 I. A., 1, 22 Bom., 528.
5 Ahmedsha Salit v. Cassimrao (1882) 6 Bom., 260 (see, 8 Bom., 290 and 519).
6 Sukhnandan Lal, re (1884) 6 All., 163.
7 Sree Mohun Ghuttuck, in the matter of (1869-70) 13 Moo. I. A., 313.
8 Maharaja Madhava Singh, petition of, (1904) 8 Cal. W. N. 841, (1905) 32 Cal., 1.
9 Leelanund v. Lakhimissar, (1870) 14 W. R., P. C., 23, 5 B. L. R., 605, 13 Moo. I. A., 490.
10 Esuf Hashum Doobly v. Fatima, (1897) 24 Cal., 30.

unless before the judgment is pronounced an amendment of the memorandum of appeal is allowed and an additional Court fee paid in [1]

Powers —The word ' powers ' is not used in the sense of jurisdiction It means powers to grant time to adjourn a hearing, to examine parties and pleaders to award costs &c,[2] and to allow a case to be withdrawn [3] On appeal from the decision of a District Munsif in favour of a plaintiff in a suit for recovery of rent the District Judge set aside the decree of the lower Court, ordered a new trial and ordered the amendment of the plaint by inserting the exact boundaries of the land on which the plaintiff claimed the rent *Held*, that the order for the amendment of the plaint was bad as there was no dispute as to the boundaries of the land before the original Court [4]

Abatement —See Order XXII

Procedure in appeals from appellate decrees and orders

108 The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

(*a*) from appellate decrees, and

(*b*) from orders made under this Code or under any special or local law in which a different procedure is not provided

Act XIV of 1882 secs 587 590

In connection with this provision the wider scope given in regard to the joinder of parties and causes of action by section 99 should be particularly noticed

As far as may be —This means as far as is consistent with the principles on which appeals from original decrees are admitted and determined [5]

The appellate Court in special appeal can remand a case for re trial [6] or for a finding on an issue [7] it cannot try an issue of fact as in regular appeal [8]

Execution proceedings —When the original suit is a suit of the nature cognizable in Courts of Small Causes and the subject matter does not exceed Rs 500 in value no second appeal will lie in respect of an order made in execution proceedings relating thereto [9]

APPEALS TO THE KING IN COUNCIL

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[1] Percival v Collector of Chittagong, (1903) 30 Calc, 516

[2] Kalikrishna v Harihar, (1903) 1 B L R, 1… p 163

[3] Gangaram v Data Ram, (1886) 8 All, 82

[4] Krishnayya v Panchu, (1894) 17 Mad, 187

[5] Hinde v Brayan, (1883) 7 Mad., 52, not followed in Beni Pershad v Nand Lal, (1897) 24 Calc, 98, and see, Ganesh v Bhikaji, (1886) 10 Bom, 398 Sohawan v Babu Nand (1887) 9 All, 26, p 29

[6] Wazeer Ali v Kalee Coomar Chuckerbutty, (1869) 11 W R, 228

[7] Ram Lall v Mohurput Roy, (1874) 21 W R, 52

[8] Hinde v Brayan (1884) 7 Mad 52 Sheo Ratan v Lapju Kuar, (1883) 5 All, 14 And see, (1884) 7 Mad, 53, (1886) 12 Calc, 37 (1887) 9 All H C, 147

[9] Din Dayal v Patrakhan (1896) 18 All, 481, (1890) 12 All, 579 Sri Bulloy v Bachiram (1885) 11 Calc, 169, Athala v Subanna, (1890) 12 Mad, 116

Value —The value of the property is the selling or market value [1] But if a defendant, having the means of proving the real value of a suit, makes no objection to the plaintiff's under valuation, and in special appeal undervalues it, he cannot be allowed to prove the real value of the estate for the purpose of appealing to the Privy Council [2]

Value of the subject matter of the suit —The subject matter of the suit is not the same as the subject matter in dispute [3] The value of the stamp on the plaint is not conclusive of the value of the subject matter [4]

Value of the appeal —A suit was brought to recover a zemindary in the possession of different persons under deeds of sale in execution of decree The value of the property was, as stated in the plaint, Rs 14325 The Sudder Court upheld the sales so far as related to the claims of some of the defendants The

[illegible]

in appeal being whether the decree was right or not, was above Rs 10 000 in value [6] and so in a suit for land where the land was valued at less than Rs 10 000, but the *wasilat* when added made it above Rs 10 000, an appeal lay,[7] but costs of suits cannot be included [8] nor interest after decree [9] Where an appeal originally competent and *bonâ fide* instituted is in the printed case confined to an amount below the prescribed limit, it is not thereby rendered incompetent [10] There is no right of appeal when the dispute relates merely to the income of property of the value of Rs 10,000 [11] In a suit for an injunction it is open to the applicant for leave to appeal to His Majesty in Council to show what the real value of the suit is notwithstanding the fact that for the purposes of the Court fees Act, the value of the suit was fixed at a sum less than the appealable amount [12] A plaintiff in suit for damages for libel cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure When there is a contest as to the value of the matter in dispute the practice is to ascertain the true value by enquiry and evidence [13]

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1 Mohun Lall *v* Beebi Dass (1859 61) 8 Moo I A, 193 (1857 60) 7 Moo I A 428 Lekhraj Roy *v* Kanhya Singh I R, 1 I A, 317, Pichayee *v* Sivagami (1892) 15 Mad 237

Bhugobutty Debia in the matter of (1870) 14 W R 62, see, however Lekhraj Roy *v* Kanhya Singh (1872) 18 W R, 494 and Ikramut *v* Wilkil (1905) 33 Calc 893

3 Hikmat Ali *v* Wahunnissa (1890) 12 All, 506

4 Mohun Lall *v* Beebi Dass (1857 60) 7 Moo I A, 428

5 Ameena Khatoon *v* Radhabinod (1857 60) 7 Moo I A 261, ref, Bhagwat *v* Bishapati (1906) 3 Calc L J 257 but see, Rudhnath Sahu *v* Gopee Sahoo 19 W R, 191

6 Sutoeschunder *v* Ganeshchunder (1865) 3 W R, P C, 14

7 [illegible] d as to *mesne profits*

8 [illegible] Nilmadhub Doss *v*

9 [illegible]

10 Kalka Singh *v* [illegible] Ram (189[illegible]) 22 Calc, 434 L R, 22 I. A, 60

11 [illegible] (19[illegible]) 26 Bom 319

12 Hari Mohan *v* Surendra Narain (1901) 31 Calc, 301

13 Amrita Nath *v* Alloy Charan (190[illegible]) [illegible] Cal, W N, 370

[illegible] 18 W [illegible] Person [illegible] tte, and [illegible] (1870)

14 W R 290

Partition —In a partition suit the value of the whole estate should be considered [1]

Order in execution —An appeal lies from an order passed by the High Court in a case of execution of decree in which the amount or value involved exceed Rs 10 000 [2]

Directly or indirectly —These words apply to suits in existence [3] If there are two or more suits, each less than Rs 10 000 in value, in which separate judgments have been given they cannot be consolidated Each judgment when pronounced is final and conclusive, [4] but if there are several suits, the aggregate amount of which is more than Rs 10 000, and the decision of one governs them all, the appeal will be allowed [5] And where of six suits heard on the same evidence and concluded by the same judgment five were appealable as of right, and in the sixth there was an important point of law not raised in the other five, a certificate was granted [6] When the value of the property in suit was below Rs 10 000 but the effect of a *hibanama* with regard to the construction of which there was a dispute, would govern the ownership of property worth 5 lakhs, a certificate to appeal was granted [7]

Affirms the decision of the Court below —See *Asghar Reza* v *Hyder Reza* [8] Where there is no point of law involved in a case the mere fact that the finding of the appellate Court does not in terms coincide with that of the original Court, is not sufficient where the findings of fact of the two Courts are in effect the same, to give a right of appeal to the Privy Council, notwithstanding that the value of the suit is more than Rs 10,000 [9] A decree of the High Court dismissing an appeal for want of prosecution, the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing is a decree affirming the decision of the Court immediately below [10] The word decision means the decision of the suit It cannot like judgment mean the statement of the grounds of the decree in order to affirm the decision of the Court below, it is sufficient to affirm the decree [11] A question of fact decided in the first Court and not raised in the High Court cannot be dealt with in appeal to Privy Council [12]

Substantial question of law —This provision is not *ultra vires* of the power of the Indian Legislature as being a curtailment of the jurisdiction given to the High Courts by the Letters Patent 1865 cl 39 [13] The meaning of this

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[1] Lala Bhagwat v Rai Pashupati (1906) 10 Calc W N 564

[2] Velaety Begum v Rughoonath Pershad (1867) 8 W R 147

[3] Hanuman Prasad v Bhagwati Prasad (1902) 24 All 236

[4] Mohummud Ubdoollah v Mootechand (1866) 5 W R, P C, 34

[5] Kochline v Smadden (1868) L R 2 P C, 50 Ahsanulla v Karoonamoyi (1879) 4 C L R, 125, Joogulkishore v Tagore (1882) 8 Calc, 210 Followed in, Deonarain v Gani (1907) 34 Calc, 400, Mahammad Yusuf in the matter of, (1896) 18 All 196, but see, Royal Ins. Co. v Akhoy Coomer Dutta, (1901 2) 6 Calc W N, 41

[6] Byjnath v Graham (1885) I

[7] Ahmad v Hasiba (1896 7) ... nda Chandra v Broughton (1871 2) 9 ... ector of East Burdwan (1859 61) 8 Moo ... point of law was involved—Rogers v ... , 103, (1860) 2 W R, P C 51 Kerakoose v Brooks, (1860) ... , 339, (1860) 4 W R, P C, 61

[8] Asghar Reza v Hyder Reza, (1889) 16 Calc, 287, p 298

[9] Thomson v Calcutta Tramways Co, (1894) 21 Calc, 523, see also, Sreenath Roy v Secretary of State (1882) 8 Calc. W N, 294.

[10] Beni Rai v Ram Lakhan (1898) 20 All 367

[11] Tassaduq Rasul Khan v Kashi Ram, (1903) 25 All, 109, (1902 3) 7 Calc W N 177, L R, 30 I A, 35.

[12] Dhanukdhari v Mahabir (1907) 34 Calc, 709 6 Calc L J, 11, 11 Calc W. N, 709

[13] Feda Hossein, in re, (1876) 1 Calc, 431.

section is not th
includes cases
the argument as
the remarks of their lordships of the Privy Council in *Durga v. Jawahir* [2] When upon the facts found no question of law arises, leave to appeal should be refused [3]

There is no substantial question of law when it only arises if the concurrent findings of fact of the low
peal to the Privy Council
involved, if the value of
judgment in the manner re
jection of an application fo
a substantial question of law [7] An objection that an application for execution was improperly granted by the Court of first instance in the absence of a certificate of success on under s 4 Act VII of 1889 does not raise a substantial question of law so as to warrant the High Court in granting leave to appeal to His Majesty in Council [8]

To allow leave to appeal on the ground that there seems to be a point of law is not a compliance with s 596 (4) former Code, (s 110), which requires that there must be some substantial question of law [9]

Maintenance —It is not the practice of the Privy Council to interfere in a question of amount of maintenance [10] or generally in questions depending on facts as to which familiarity with Indian manners and customs is necessary [11]

Review —*An order granting leave to appeal to the Privy Council is open to review* [12]

111 Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

Bar of certain appeal

(*a*) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or

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[1] Gopinath v Goluck Chunder (1889) 16 Calc, 292

[2] Durga v Jawahir (1889 90) L R, 17 I A, 122, 18 Calc, 23 pp 25 31, Mannalal v Gajraj (1890) 17 Calc 246, Nirbhai Das v Ram Kuar, (1894) 16 All, 274, Tulsi Persad Bhakt v Benayek Misser, (1896) 23 Calc, 918, L R, 23 I A, 102

[3] Vishambhar Pandit, in re, (1896) 20 Bom, 699

[4] Banke Lal v Jagat Narain, (1901) 23 All, 94

[5] Banarasi Parsad v Kashi Krishna Narain (1901) 23 All, 227, 5 Calc W N, 193, L R 28 I A 11 Radha Kishen Das v Rai Kishen Chand, (1901) 23 All, 415, 5 Calc W N, 650, L R, 28 I A, 182

[6] Sundar Bibi v Bishe har, (1887) 9 All, 93

[7] Prem Chand Moonshee, in the goods of, (1894) 21 Calc, 181.

[8] Shuja Ali v Ram Kuar, (1898) 20 All, 118

[9] Karuppanan v Srinivasan Chetti, (1902) 25 Mad, 215; L R, 29 I A, 38, 6 Calc W N, 241

[10] Kachu v Kachu (1906) 10 Calc W N, 93 7 L a L R, 607

[11] Kunwar v Ram Satrujit, (1906) 10 Calc W N, 260; 3 Calc L J, 86

[12] Gopinath v Goluck Chunder, (1889) 16 Calc, 292, a te

more Judges of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being, or

(b) from any decree from which under section 102 no second appeal lies

Act XIV of 1882 Sect 597

See notes to section 98 ante

24 and 25 Vict c 104 is the Indian High Courts Act 1864, for which see Appendix

Savings

112 (1) Nothing contained in this Code shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts

Act XIV of 1882 sect 616

The Privy Council is not bound by the Procedure Code[1]—nor does it limit the prerogative of the Crown to admit appeals[2] in matters which are not strictly appealable grievances[3]

Special leave to appeal—The Privy Council can grant special leave to appeal, but they will not entertain it from a decree of the High Court when the subject matter in suit is less than Rs 10,000[4] Unless the petitioner has applied *to the High Court for a certificate and has been refused*,[5] *and if the petition for* leave contains a misstatement of facts it is liable to be rescinded[6] Where the

[1] Luchmeeput Singh v Khatun (?) (1870) 14 W R 280

[2] Rahimbhoy v Turner, (1891) 15 Bom 155 L R, 18 I A 6

[3] Morgan v Leech (1837 41) 2 Moo I A 478

[4] Mohun Lall v Dibee Doss (1861) 8 Moo I A 192 2 W R, P C 9

[5] Gungowa Kome v Irawa Kome (1869 70) 13 Moo I A, 433 but see Mutusawmy v Venentiswara (1864) L R, 1 P C 1

[6] Mussoorie Bank v Raynor (1881 82) L R 9 I A 70 4 All 500 See, however, Mutusawmi Jagavera v Venkataswara (1864) L R, 1 P C 1 A petition for special leave to appeal containing a general statement of the procedings in India and an averment that they were irregular and contrary to law ordered that such petition be dismissed or stood over for amendment as being too vague and general, Goree Monee v Juggut Indro, (1866 67) 11 Moo I A, 1

further security than had already been taken by the High Court [1] The Privy
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an appeal as out of time, the Judicial Committee will not interfere unless satisfied that the High Court was wrong [4]

Restoration —An appeal dismissed for default may be restored to the file on terms as to costs and on security being given [5]

Notice There is no rule entitling a respondent after he has had notice of an appeal pending to further notice that the record has been transmitted or that the appeal is set down for hearing [6]

Evidence —The Judicial Committee will not criticize with any strictness opinions as to the credibility of witnesses which is eminently a question for the Courts in India [7]

Findings of fact —It is not the practice of the Privy Council to disturb the findings of the Court below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage either in the reception or in the appreciation of evidence [8] In appeal from second appeal the findings of fact by the first Court are binding on their lordships,[9] unless special leave to appeal from the decision of the first Court has been given [10] When leave to appeal from the decree of a Subordinate Judge direct to Her Majesty in Council has not been asked for the hearing must be based on the materials open to the High Court and the finding of the Subordinate Judge on matters not involving questions of law must be taken as conclusive [11]

Concurrent findings of fact —When there are concurrent findings of fact, their lordships ordinary rule is to accept them,[12] unless very definite and explicit grounds for interference are assigned,[13] but this does not and ought

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[1] Muhammad v Najiban (1897) 19 All 95 L R, 23 I A, 167

[2] Cooneshar Singh v Gonesh Das (1898) 3 Calc W N, cccxxxviii

[3] Shankar Baksh v Bulwant Singh (1899) 4 Calc W N, 203, L R, 27 I A, 79 27 Calc 333

[4] Ram Narain Joshi v Parmeswar Narain (1903) 30 Calc 309 In cases of substitution see as to the practice, Haidar Ali v Tassadduk, 16 Calc., 184, Gaur Mohun v Tarasunderi, (1890) 17 Calc, 693

[5] Rabiabai v Mahomed Ismail, (1897) 21 Bom, 723, L R, 24 I A, 128

[6] Lalta Pershad v Azizuddin, (1896 7) L R, 24 I A, 49, 19 All, 209

[7] Shafiqunnissa v Shaban Ali Khan, (1904) 26 All, 581

[8] Richardson v Government (1864) 1 W R, P C 47 Gholam Moortoozah v Government (1861 63) 9 Moo I A, 456 Dwarka Dass v Sita Ram, (1879 80) 5 C L R, 430

[9] Anangamanjari v Tripura (1886 7) L R 14 I A, 101, p 110, (1887) 14 Calc, 740 Munnalal v Gajraj (1890) 17 Calc, 246

[10] Luchman Singh v Punna, (1889) 16 Calc, 753, L R 16 I A, 125

[11] Luchmeswar Singh v Manowar Hossein, (1891 2) L R, 19 I A, 48 at p. 53, (1892) 19 Calc, 253

[12] B [illegible], 461 L R, 19 I A, [illegible] 560, L R, 20 I A, 38, [illegible] alc 159, Sundaralinga [illegible] 22 Mad 515, Thakur Harihar v Thakur Udan Parshad, (1887) 14 Calc, 296; L R 14 I A 7, Krishnasami v Srinivasa, (1889) 12 Mad, 512

[13] Mung Thu v Mung Po (1901) 28 Calc, 1 (1899 1900) 4 Calc W N 808, L R 27 I A, 166

not to relieve their lordships from the duty of examining the whole evidence and forming an opinion upon the whole case [1] It cannot detract from the weight of concurrent findings of fact that different Courts in arriving at the same result upon the same evidence have not been influenced by precisely the same considerations a difference of opinion to that extent is only calculated to suggest that the evidence whatever view be taken of it necessarily leads to one and the

a fact in issues [3] When no question of law either as to the construction of documents, or any other point arises on the final judgment and where there are concurrent findings of both Courts on oral and documentary evidence submitted to them *held*, that the appeal cannot be entertained [4] In such a case no appeal lies, when there is no question of law [5] In an action for malicious prosecution, when there were concurrent findings of fact both as to the absence of proof of malice and of the want of reasonable and probable cause, the Privy Council held that there was no question of law involved [6] A case when one Court has relied on the oral and the other on the documentary evidence is within the rule [7]

New points—A point not raised in the plaint before the District Judge, or before the High Court, cannot be raised before the Judicial Committee [8] No issues upon a certain question having been tried in the Court of first instance it ought not to be allowed to be raised in appeal before their lordships [9]

Rehearing—The judgment of the Judicial Committee reported to, and confirmed by His Majesty in Council, cannot be re opened merely for the reason that new evidence is forthcoming [10] though there may be exceptional circumstances which will warrant a re hearing at the instance of one of the parties [11]

What appellant must show—To induce their lordships to disaffirm the High Court's finding in favour of the plaintiff the defendants must do more than show that his title is not free from doubt [12]

Practice as to hearing appeals *ex parte*—As regards the practice in hearing appeals *ex parte* see order of the 20th March, 1905 published in *Gazette of India* June 10th 1905 Pt 1 p 385

Costs Respondents who do not appear are on the dismissal of their appeal entitled to their costs up to and including the lodgment of case and also to the costs of applying for those costs [13] In a case in which the miscarriage of the suit was occasioned by the manner in which the issue was framed by the Judge, the costs of appeal were directed to be costs in the cause [14]

[1] Modhoosudun v. Sroop Chunder (1867) 7 W R P C 73 (1846 50) 4 Moo I A 431 Srimati v. Khagendra Narain Singh, (1903 4) L R, 31 I A 127 31 Calc 871 8 Cal W N 74

[2] , 20 I A, 95

[3] R, 23 I A, 97

[4] 102 23 Calc 918

[5] [6] 90 5 Calc W N

R 22 I A, 51

[7] Pestonji Modi v. Queen Insurance Co (1901) 25 Bom 332
Ram Anugra v. Hanuman Sahai (1903) 30 Calc 303 7 Calc W N, 225 L R, 30 I A 41

[8] Sambhu Nath v. Surjamoni (1898) 25 Calc 187 L R, 24 I A 191, 1 Calc

A, 161

[9] , 21 I A, 118

[10]

[11]

[12] R 19 I A 147

[13] Sumbhu Nath v. Surjumoni, (1898) 25 Calc 187, (1896 7) L R, 24 I A, 191, 1 Calc W N, 613 See also as to costs in an *ex parte* application—Mahomed J Rahamatulla v. Thummalapalli (1898) 2 Calc W N, clxi.

[14] Perhlad Sein v. Run Bahadur, (1867 9) 12 Moo I A, 291, ibid, 343

PART VIII.

REFERENCE, REVIEW AND REVISION.

Reference to High Court

113 Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit

Act XIV of 1882, Section 617 This section applies to H C and Prov S C C

The provisions relating to reference review and revision remain substantially the same as in Act XIV of 1882, details are relegated to Orders XLVI and XLVII *post* and the relevant decisions under the Old Code are collected in the notes to the rules of those orders

Review

114 Subject as aforesaid, any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is allowed by this Code, or

(*c*) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

Act XIV of 1882, Section 623 This section applies to H C and Prov S C C

This section establishes the general right to apply for Review and sanctions the prescription of rules within the limits here defined Order XLVII, r 1, drafted by the framers of this Code re enacts word for word section 623 of Act XIV of 1882 See the notes to that rule

Revision

115. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit

Act XIV of 1882 Section 622 [1]

Court of Small Causes — This section applies to the Court of Small Causes in the Presidency towns under the corresponding section of Act XIV of 1882, *the Calcutta High Court set aside an order of the first and fourth Judges* of the Small Cause Court reversing a judgment of the fourth Judge and dismissing the plaintiff's suit with costs It was held that the Judges had exercised the power of an appellate Court in setting aside the original decree and exceeded the jurisdiction vested in them by s 38 of the Act (I of 1895) such jurisdiction being a revisional jurisdiction [4] If the judgment of a Small Cause Court is defective, the *High Court* can interfere in revision by setting aside the decree and directing a trial on the merits [5]

In exercise of extraordinary jurisdiction the Court will not usually interfere except in cases of grave and otherwise irreparable injustice [6]

Time of making application — The rule has always been that these applications should be made without delay [7] otherwise the High Court will not interfere [8]

May call for — The Calcutta and Allahabad High Courts can act under this section without there being any application by any of the parties [9]

[1] In a 7 (I (ss. 72 and 73 to a Mamlatdar's Court in Bombay, 97 but not to a Revenue Court (19 Mad 332, Appandai v. Srihari, asimha Naidu v. Surinna, (1894) 17 Mad, 295 or in the North West Provinces—*Ram Dayal v. Ramadhin*, (1890) 12 All, 198

[2] See s 25, Act X of 1887

[3] Petry Mohun v. Harran Chunder (1885) 11 Calc, 261

[4] Sassoon v. Hurry Das Bhukut (1897) 24 Calc 450 1 Calc. W N, 44

[5] *Malik Rahmat v. Shiva Prasad (1891) 13 All* 533 See also Haladhar Maiti v. Chaytonya Maiti (1903) 30 Calc 58 7 Cal W N 547

[6] Ismalji v. Macleod, (1906) 8 Bom L R 905

[7] *Durga Prasad v. Sheo Charan* (1882) 4 All 154 Balmakund v. Sheo Ratan, (1884) 6 All, 125

[8] Kally Mohun v. Raj Chunder (1874) 22 W R 22, Bhuggobutty v. Money, (1878) 2 C L R, 45

[9] Golam Mahammad v. Sarada Mohan Maitra, (1879) 4 Calc W N, 695, Pran Mal v. Janki Parshad (1901) 28 Calc, 680 6 Calc W N, 114, and *Debi Das v. Ejaz Hassain, (1906) 28 All, 72*

The other High Courts have exercised the revisional powers on the application of a pre-emptor in regard to a sale [1] of a Collector in regard to an order in a pauper suit and in the report of a District Judge. A Collector cannot make a reference under this section inviting the High Court to set aside a Mamlatdar's decree in a possessory suit [2]

No appeal lies.—The Court cannot act where there is an appeal, such as an order rejecting a plaint or rejecting a memorandum of appeal as barred or an order ... extending the time for payment of the mortgage money by the mortgagor which is a decree and therefore appealable [3] but ... appeal ... where no appeal lies, the Court may proceed to act under this section at the hearing [4] Where a second appeal lies, a petition for revision is not admissible.[1?]

Other remedy open.—The High Court will not usually exercise its revisional jurisdiction as long as there is any other remedy open to the applicant,[11] but this is not the invariable rule [1?] When it is open to the parties aggrieved to establish their right by a regular suit, the High Court will not interfere under this section [13] In a suit for possession when the Mamlatdar had not declined jurisdiction but had ... entered the matters before him and come to a conclusion the Bombay High Court declined to interfere, holding that the aggrieved party's remedy ... in a separate suit [14]

Case was decided—Interlocutory orders.—This section does not apply to interlocutory orders when there is an appeal from the final decree.[1]

Jurisdiction.—The term jurisdiction is used in different senses. In one sense it means jurisdiction over the subject matter of the suit itself, and it is used in this sense when it is said that the decrees of a Court of competent jurisdiction upon the parties ... before it cannot be questioned in a Court of co-ordinate jurisdiction on the ground of irregularity or error of law in the proceedings [1?] Their Lordships of the Privy Council have ... the word in this

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[1] Bishshan v. Hari Singh (188) ... All. 42.

[2] Collector of Kanara v. Krishnappa (1891) 1? Bom. ... ; ... see, V... v. Daudbhai (1890) 14 Bom. 571.

[3] Anthony v. Dupont (1882) 4 Mad. 217.

[4] Paul ... v. Dowell (1887) ... Bom. 86.

Ram Kr... v. Tara Das (1882) ... 12 C. L. R. 440; Vazir Hasan v. Ram Mal (1890) 12 All. ... 31; ... Mal ... (1897) 11 ... 20 ... see Dhanpat v. Ram Persaud (1887) 14 ...

[5] Omrao Mirza v. Jones (188) 12 C. L. R. 148.

Girdhari Ram v. Mannu Lal (1885) 7 All. 42.

[6] Ram ... v. Nepal Rai (1892) 14 All. ... 30.

[7] Venkataramma v. Chen ... (1884) 7 Mad., ... ; ... Durga Narain v. Ram Lal (1881) 7 Calc. 230; Durga Narain v. ... (1881) 9 C. L. R. ...

[10] Tirupati v. Venkata (1 07) 30 Mad., ...

[11] ... v. Jai ... (1893) 15 All., ...; Gopal Das v. Altaf Husain (1) 11 All., 287.

[12] Debi Das v. Ejaz Husain, (1906) 28 All. 72; (1905) A. W. N., 191; ... Shah ... v. Dwarka Prasad (1896) 18 All. 163.

[13] ... Pandurang v. Pandurang ... (1888) 12 Bom. 221.

[14] Ka... v. Nana (1897) 21 Bom., 731.

[15] ... v. Durga (1884) 6 All. ... 33; ... v. ... (18) ... Lal ... Durga ... Chander

[16] ... v. Lee ... (188) 3 C. ... & ... 479; ... v. Evans, (18) ... L. Cas., ...; ... v. ..., (1882) 4 Mad., 131.

Their lordships of the Privy Council have been slow to decide that the violation of any section of the Code bearing on the *ordinary* course of a suit from institution to final execution affects jurisdiction, or is more than an irregularity There are only two cases, one in regard to arbitration,[1] and the other in connection with admitting a review after time,[2] and it may be doubted if either falls within ordinary procedure from plaint to final disposal See "POWER TO REVIEW, *ante* When a Court of first instance of appeal has exercised a jurisdiction not vested in it by law, the High Court is bound to interfere under its revisional powers [3]

Mamlatdar's Court —When C had got a decree for possession against P in a Mamlatdar's Court, and the Mamlatdar in execution directed the ouster of C, who was in possession, but who was not a party to the decree, it was held that the Mamlatdar's order was without jurisdiction, and it was set aside under this section [4]

Dekhan Agriculturist's Relief Act —When a special Judge under Bombay Act XVII of 1879 has exercised his discretion in setting aside the decree of a subordinate Judge, the High Court will not interfere except under exceptional circumstances [5] A Special Judge under this Act has power to review an *ex parte* order made by him and the High Court will not interfere with such an order under the section [6] He can vary the decree of the lower Court *proprio motu*, where not reviewing the case on th
When a Subordinate Judge has held th
an agriculturist a special Judge has no
is an agriculturist and such an order will

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(B C) of 1868 [9] The small Cause Court of Calcutta having jurisdiction to deal with municipal valuations fixed under Act III of 1899, the High Court cannot interfere under this section [10]

Failed to exercise jurisdiction —This section extends to the case of a

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1 Har Narain v Bhagwant Kuar (1891) 13 All 300 L R, 18 I A, 55.

2 Luchmun Singh v Shumshere, (1874 5) L R, 2 I A., 58.

3 Ramasamy Chettiar v Orr (1903) 26 Mad., 176 but see Parameshwaran v Vishnu (1904) 27 Mad, 4,8

4 Chinaya v Gangava (1897) 21 Bom, 775, Nathekha v Abdul Ali, (1894) 18 Bom, 449

5 Raychand v Rahimbhai (1894) 18 Bom, 347 See also, Chudhu v Bali, (1891) 15 Bom, 180 and Gurulasaya v Chunnalappa, (1895) 19 Bom, 286, Ram Singh v Kisan Singh (1895) 19 Bom., 116.

6 Ramchandra v Draupadi, (1896) 20 Bom, 281

7 Balkrishna v Mahadeo, (1898) 22 Bom, 520

8 Lakshman v Ramchandra (1899) 23 Bom, 321

9 Corporation of Calcutta v Bhupati Roy, (1899) 26 Calc, 74.

10 Corporation of Calcutta v Cohen (1901 2) 6 Calc W. N, 480

11 Shiva v J ma (1883) 7 Bom, 341, p 3,2

12 Zamiran v Fateh Ali (1905) 32 Calc, 146

13 Nilo an Singh v Tarmath (1882) L R., 9 I A, 174 (1882) 9 Calc, 295, pp 297 298

14 Shamrav v Niloji (1886) 10 Bom 200

sense in several cases as opposed to irregularity in procedure.[1] There is another principle, that whenever jurisdiction is given to a Court by an enactment, and such jurisdiction is only given on certain specified *terms contained in* the enactment itself, these terms must be complied with, *in order to create and raise the jurisdiction*, for if they be not complied with, the jurisdiction does not arise.[2] Thus, as an illustration of the first kind of jurisdiction, if the subject-matter of the litigation was not a suit a Court of appeal has no jurisdiction at all to entertain an appeal under s. 96,[3] and in regard to the second, a Court cannot give judgment on an award unless under the provisions of s. 521 former Code, (see sch. II) it has been made within the period *allowed by the Court*,[4] nor admit a review after 90 days without being satisfied that there is sufficient *cause*, as *directed* by the Limitation Act [5] prohibiting the review of an order passed in review,[6] nor stay sale of property on the application of an unsuccessful claimant pending the hearing of a suit instituted in another Court, when such latter Court has refused to issue an injunction under s. 492 former Code, (Order XXXIX r. 1).[7] And where the conditions required by this section did not exist, their lordships of the Privy Council held that the Court had no jurisdiction in the case.[8] In all these cases the proceedings are void and the defect cannot be cured by consent.[9]

This section applies to a case in which a Judge has exercised a jurisdiction which he has no power to exercise, or in which in the exercise of a jurisdiction, [illegible][10] [illegible] has acted illegally or with material [illegible] ction this [illegible] the High [illegible] h want of [illegible] ent on the face of the reco[illegible] [illegible] ion.[14]

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[1] Ledgard v. Bull, (1885-6) L. R., 13 I. A. 134 : (1887) 9 All. 191. Pillai v. Lillu, (1874-5) L. R., 2 I. A. 219 p. 2[illegible]

[2] Nusserwanjee v. Mynoodeen (1849-[illegible]) 6 Mo. I. A. 134 p. [illegible]

[3] Minakshi v. Subramanya (189[illegible]) L. R. 24 I. A. 1[illegible] : (1888) 11 Mad. 26; Ladli v. Raja (1889) 13 Bom. [illegible]

[4] Har Narain v. Bhagwan K[illegible] (1890) L. R. 18 I. A. [illegible] 1[illegible] All. 300.

[5] Luchmun Singh v. Shumsher (1874-5) L. R. 2 I. A. [illegible] [illegible] s. 629 former Code (O. XLVI r. 7.)

[6] Muhammad Yusuf v. Abdul (1888-9) L. R. 16 I. A. 104.

[7] Brojendra Kumar v. Rup Lall 1886 12 Cal. [illegible]

[8] Compare Nadir Lal v. Mazhar Husain (188[illegible]) 7 All. [illegible] Amir Hassan v. Sheo Baksh (1883-4) L. [illegible] 11 I. A. 237. See also Shivappa v. Jma, (1883) 7 Bom. 341 p. [illegible] Hira Pershad v. Fatu Ali (188[illegible]) 7 All. 34.

[9] Luchmun Singh v. Shumsher (1874-5) L. R., 2 I. A. 58. Nusserwanjee v. (1849-[illegible]) Mynoodeen 6 Mo. I. A. 134. Ledgard v. Bull (1885-6) L. R., 13 I. A. 134 : 9 All. 191.

[10] Sul[illegible] Ostagar [illegible] W. R. M[illegible], 7 [illegible] also Peary Mohan [illegible] [illegible] 201 and Mahamed Hamidulla v. [illegible] Cal. W. N., 6[illegible]2 See also, Mommohun v. [illegible] [illegible]

[11] Muhammad Suleman v. Fatima (1887) 9 All. 104.

[12] Rochoo Roy, in the matter of, (1870) 14 W. R. 2[illegible]

[13] Bhy[illegible] Chunder v. [illegible] Shamas v. Nilg[illegible] (1880) 10 Bom., 2[illegible] [illegible], (1882) 8 Cal. 5[illegible] but see, Durga [illegible] [illegible] see also Durga [illegible] above. And where the [illegible] *Lad* is in temporary charge of a [illegible] possessory suit; Sitaraya v. Dadaji, (1897) 21 Bom., 5[illegible]

[14] Mihr Ali v. Muhammad, (1882) 11 All., 413.

Their lordships of the Privy Council have been slow to decide that the violation of any section of the Code bearing on the *ordinary* course of a suit from institution to final execution affects jurisdiction, or is more than an irregularity There are only two cases, one in regard to arbitration,[1] and the other in connection with admitting a review after time,[2] and it may be doubted if either falls within ordinary procedure from plaint to final disposal See "POWER TO REVIEW, *ante* When a Court of first instance of appeal has exercised a jurisdiction not vested in it by law, the High Court is bound to interfere under its revisional powers[3]

Mamlatdar's Court —When G had got a [illegible] a Mamlatdar's Court and the Mamlatdar in[illegible] who was in possession, but who was not a p[illegible] the Mamlatdar's order was without jurisdiction, [illegible] section[4]

Dekhan Agriculturist's Relief Act —When a special Judge under Bombay Act XVII of 1879 has exercised his discretion in setting aside the decree of a subordinate Judge, the High Court will not interfere except under exceptional circumstances[5] A Special Judge unc[illegible] *ex parte* order made by him and the Hi[illegible] order under the section[6] He can vary tl[illegible] *motu*, where not reviewing the case on th[illegible] When a Subordinate Judge has held th[illegible] an agriculturist a special Judge has no [illegible] is an agriculturist and such an order will [illegible]

Small Cause Court —The High Court has no power to interfere under this section, or s 25 of the Provincial Small Cause Courts Act, or s 15 of 24 and 25 Vict, c 104, with an order of Small Cause Court passed under s 157 of Act II, (B C) of 1888[9] The small Cause Court of Calcutta having jurisdiction to deal with municipal valuations fixed under Act III of 1899, the High Court cannot interfere under this section[10]

Failed to exercise jurisdiction —This section extends to the case of a [illegible] to act thro[illegible] misconception of his authority,[11] as returning

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1 Har Narain *v* Bhagwant Kuar (1891) 13 All, 300, L R, 18 I A, 55

2 Luchmun Singh *v* Shumshere, (1874 5) L R, 2 I A, 58.

3 Ramasamy Chettiar *v* Orr (1903) 26 Mad, 176 But see Parameshwaran *v* Vishnu (1904) 27 Mad, 478

4 Chinaya *v* Gangava (1897) 21 Bom 775, Nathekha *v* Abdul Alli, (1891) 18 Bom, 449

5 Ravachand *v* Rahimbhai (1891) 18 Bom, 347 See also, Khidhu *v* Bali (1891) 15 Bom, 180, and Gurubasaya *v* Chunmalappa, (1895) 19 Bom, 286, Ram Singh *v* Kisan Singh (1895) 19 Bom, 116.

6 Ramchandra *v* Draupadi, (1896) 20 Bom, 281

7 Balkrishna *v* Mahadeo, (1898) 22 Bom, 520

8 Lakshman *v* Ramchandra (1899) 23 Bom, 321

9 Corporation of Calcutta *v* Bhupati Roy, (1899) 26 Calc, 74.

10 Corporation of Calcutta *v* C[illegible] (1901 2) 6 Calc W. N, 480

11 Shiva *v* J[illegible] (1882) 7 Bom, 341 p. 342

12 Zamirani *v* Fateh Ali (1905) 32 Cal, 146

13 Mahomed Singh *v* Taranath (1882) L R, 9 I A, 174 (1882) 9 Calc, 295, pp 297, 2[illegible]

14 Shankar *v* Niloji (1886) 10 Bom 2[illegible]

sense in several cases as *opposed to irregularity in procedure*,[1] There is another principle, that whenever jurisdiction is given to a Court by an enactment and such jurisdiction is only given on certain specified *terms* contained in the enactment itself these terms must be complied with, in order to create and raise the jurisdiction *for if they* be not complied with, the jurisdiction does not arise"[2] Thus as an illustration of the first kind of jurisdiction, if the subject-matter of the litigation was not a *suit*, a Court of appeal has no jurisdiction at all to entertain an appeal under s 96;[3] and in regard to the second, a Court cannot give judgment on an award unless under the provisions of s 521 former Code (see sch II) it has been made within the period allowed by the Court,[4] nor admit a review after 90 days without being satisfied that there is sufficient cause, as directed by the Limitation Act [5] prohibiting the review of an order passed in review,[6] nor stay sale of property on the application of an unsuccessful claimant pending the hearing of a suit instituted in another Court, when such latter Court has refused to issue an injunction *under* s 492 former Code, (Order XXXIX r 1)[7] And where the conditions required by this section did *not* exist, their lordships of the Privy Council held that the Court had no jurisdiction in the case[8] In all these cases the proceedings *are* void and the defect cannot be cured by consent[9]

This section applies to a case in which a Judge has exercised a jurisdiction which he has no power *to* exercise or in which in the exercise of a jurisdiction, that he has he exceeds his jurisdiction[10] or has acted illegally or with material *irregularity*[11] Where an appeal is heard by a Court that has no jurisdiction this section applies[12] and if a second appeal is preferred from his decision, the High Court may proceed under this section[13] Unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent on the face of the record, the Allahabad High Court will not interfere in revision[14]

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[1] Ledgard v Bull (18[illegible]) [illegible] (1887) 9 All 191 Pillai [illegible] (187[illegible]) [illegible] 21 [illegible] p 244

[2] Nusserwanjee [illegible] (18[illegible]) [illegible] 134 p [illegible]

[3] [illegible] (189[illegible]) [illegible] 24 I A [illegible] (1888) 11 Mad 26[illegible] [illegible] 1889 [illegible] Bom [illegible]

[4] [illegible] (1891) [illegible] 18 I A [illegible] 13 All [illegible]

[illegible] (1894) L R 21 I A [illegible] [illegible] (2) [illegible] (O XXXIX [illegible])

[5] Muhammad [illegible] (188[illegible]) [illegible] 16 I A [illegible]

[illegible] 1886 12 Cal [illegible]

[6] Compare [illegible] (188[illegible]) 7 All 30 Amir Hossain [illegible] (1883 4) [illegible] 11 I A [illegible] See also [illegible] (1883) 7 Bom [illegible] (188[illegible]) 7 All 345

[9] Lachmun Singh [illegible] (187[illegible]) L R 2 I A [illegible] Nusserwanjee [illegible] (184[illegible]) [illegible] I A 134 [illegible] Ledgard v Bull (1886) L R 13 I A 134 9 All [illegible]

[10] Sultan Ostagar [illegible] (1866) 6 W R [illegible] 77 [illegible] [illegible] (1880) [illegible] Cal 264 and Mohamed Hamidulla v [illegible] (18[illegible]) [illegible] Calc [illegible] Cal W N, 672 See also, Monmohini v Nara Narain [illegible] Cal [illegible] 400

[11] Muhammad Suleman v Fatima (188[illegible]) [illegible] All 104

[12] [illegible] in the matter [illegible] (1870) 14 W R 2[illegible]

[13] Bhojrah Chunder v Wajeduni [illegible] (1880) [illegible] L R 244 [illegible] (1886) 10 Bom 298 [illegible] (1882) 8 Calc 537, but see, Durga Narain [illegible] (1881) [illegible] see also Durga Narain v Ram Lall (1881) 7 Cal [illegible] above And where the first Court acted without jurisdiction [illegible] and the superior Court wrongly heard an appeal [illegible], Annamalai Chetti v Muthulinga (187[illegible]) 6 Mad H C, 103 See also where a *karkun* in temporary charge of a Mamlatdar's office passed a decree in a possessory suit; [illegible] (1897) 21 Bom [illegible]

[14] Mihr Ali v Muhammad, (1892) 14 All, 413.

an *ex parte* order passed under the Guardians and Wards Act, 1890, by the Agent to the Governor in the Scheduled District of Vizagapatam on the ground that the petitioner's vakil had not been heard [3]

On the other hand, the fact that a Court, having power to decide whether or not a certain matter was barred as *res judicata*,[4] or was barred by limitation, , affords no inadmissible erial irregularity [6] The fact that a Court has misunderstood the effect of a document in evidence does not constitute a ground upon which the High Court can interfere in revision [7]

Material irregularity —This means an irregularity in procedure which has produced error or defect in the decision of the case upon the merits [8] This sub section is intended to authorize the High Court to interfere and correct gross and palpable errors of subordinate Courts so as to prevent

unless a failure of justice has occurred [15] A wrong decision on a question of limitation is not open to revision,[16] nor is an order to pay rent by instalments under the Bengal Tenancy Act which is an error in law and not in jurisdiction [17]

This section contemplates interference with a perverse decision on a question of law or procedure, a decision being perverse when it is a conscious departure from some rule of law or procedure [18]

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[1] Gurunath v Chenbasappa, (1894) 18 Bom, 745.

[2] Patel Kilabhai v Hargovan, (1895) 19 Bom, 133

[3] Chakrapani v Varatalamma, (1895) 18 Mad, 227

[4] Hari v Naro, (1885) 9 Bom, 432

[5] Sundar Singh v Doru Shankar, (1898) 20 All., 78.

[6] Madhavrav v Gulabbhai (1899) 23 Bom, 177. But see, Sato Koer v. Gopal Sahu (1907) 34 Calc, 929 and Mohant v. Lakhai (1907) 11 Calc. W N, 111.

[7] Dasrath Rai v. Sheodhin Rai, (1894) 16 All, 39

[8]] Chunder,

[9] , Raghu-

[10] Budrappa v Narsing Rao, (1905) 29 Bom, 213.

[11] Balmukund v. Sheo Jatan, (1884) 6 All., 125.

[12] Jagannath v. Sassoon, (1894) 18 Bom, 606.

[13] Tirupati v Muttu, (1888) 11 Mad., 322.

[14] Asharfi Lal v Deputy Commissioner of Bara Banki, (1895) 22 Calc., 729; L. R., 22 I. A., 90.

[15] Lakhmo Sunder v Sooshee Mohun, (1874) 22 W. R., 277.

[16] Ambika Lal v. Debendra Lal, (1897-98) 2 Cal. W. N., cccxxxiv.

[17] Sheobh Narain v. Lakhan Sha (1907) 11 Calc. W. N, 857.

[18] Kristamma v Chapa, (1894) 17 Mad., 410

suit, holding there was no cause of action,[1] or refuses to listen to a charge of fraud as a ground for setting aside a sale,[2] or wrongly thinks s. 544 (Order XLI, r 4) does not apply to an appeal to which it does apply,[3] or declines to investigate a complaint under s 278, (Order XXI, r 58) [4] or wrongly thinks that the provisions of s 310 A (Order XXI, r 89) do not apply [5] his order may be set aside But if a Judge exercises jurisdiction, though in an erroneous manner, this portion of the section does not apply [6] When a Judge at the instance of a person not a party to the suit refused to pass an order for the execution of a decree, it was held that he had failed to exercise a jurisdiction vested in him by law [7] A suit *in forma pauperis* was rejected, but the Judge omitted to order the recovery from the plaintiff of the Court fees payable The decree was rectified by the High Court under this section [8]

Acting illegally —The application of the words "acting illegally" to procedure within jurisdiction is not easy For, if the law violated is mandatory, the violation affects jurisdiction and if not, it is only an irregularity. It has, however, been used in the former sense by the Calcutta High Court, and the language has been approved of by their lordships of the Privy Council [9] The meaning to be attached to this sub section is not settled A Judge would act illegally, although he possessed jurisdiction over the subject matter, if he heard any suit or other proceeding in which he was a party or personally interested, or if he heard an appeal against a decree or order passed by himself in another capacity—Act VII of 1887 s 38, or, possibly, if he imported into the case his own knowledge of particular facts,[10] but he cannot be said to have acted illegally if he merely errs in his final decision,[11] but it has been held that if the decision has been arrived at by travelling beyond the issues,[12] or it declares that by reason of a particular Statute the suit does not lie,[13] the Judge has acted illegally within these words Where a Judge decreed a claim brought upon two *hundies*, which were inadmissible in evidence for want of impressed stamps, the Bombay High Court reversed his decree under this section [14] When a Judge refused to allow a party interested in a probate case to appear and oppose the grant of probate, from which order no appeal lay, the Calcutta High Court held that the Judge had acted illegally, and interfered under the corresponding section of Act XIV of 1882 [15] A District Judge who admits in evidence an unregistered lease which required

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[1] Rama v Kunji (1886) 9 Mad 375

[2] Subbaji v Srinivasa (1886) 2 Mad, 264, Cf Brijmohon v Rai Umanath, 20 Calc 8, L R 19 I A 134

[3] Seshadri v Krishnan (1885) 8 Mad, 192

[4] Jameela v Luchman (1879) 4 C L R, 74

[5] Jogodanund v Amrita Lal (1895) 22 Calc 767

[6] Rabbiha Khanum v Noorjehan (1886) 13 Calc, 90 Amir Hassan v Sheo Baksh (1885) 11 Calc 6, L R, 11 I A 237, and see Krishna Mohini v. Kedarnath (1888) 15 Calc 446, Amritrav v Balkrishna, (1887) 11 Bom., 488, Cristamma v Chapa, (1894) 17 Mad 410, Mathura Nath v Umesh Chandra (1896 7) 1 Calc W N, 626, at 633, and (1906) 28 All, 84

[7] Nathubhai v Nana, (1895) 19 Bom, 544

[8] Collector of Kanara v Rambhat, (1894) 18 Bom, 434 See also, Collector of Vizagapatam v. Abdul Kharim, (1898) 21 Mad, 113

[9] Luchmun Singh v Shumshere (1874 5) 2 I A, 58, p 59; and see Muhammad Yusaf v Abdul, (1888 9) L R, 16 I A, 104; Manisha v Siyali, (1888) 11 Mad, 220, p 229, Vishvambhar v Vasudev, (1892) 16 Bom, 708; Salamma v Martjava (1892) 16 Bom, 711

[10] Hurpurshad v Sheo Dyal, L R, (1875 6) 3 I A, pp. 285 6, 26 W. R, 55.

[11] Amir Hassan v Sheo Baksh, (1883 4) L R, 11 I A., 237; 11 Calc, 220, p 229

[12] Gorakh v Vithal (1887) 11 Bom, 435, or is unsupported by proof—Shields v. Wilkinson, (1887) 9 All, 398

[13] Jugobundhu v Jadu Ghose, (1888) 15 Calc, 47.

[14] Chenbasappa v Lakshman (1874) 18 Bom, 369; so also in—Fatechand v Kisan, (1894) 18 Bom, 614 But see, Mulji v Lingu Makaji, (1897) 21 Bom, 201.

[15] Khettramoni v Shyama Churn (1894) 21 Calc, 539.

registration, exercises his jurisdiction illegally and his decree can be set aside under this section [1] A Mamlatdar acts illegally when he permits a tenant to deny his landlord's title [2] It was held that the Madras High Court could set aside an *ex parte* order passed under the Guardians and Wards Act, 1890, by the Agent to the Governor in the Scheduled District of Vizagapatam on the ground that the petitioner's vakil had not been heard [3]

On the other hand the fact that a Court having power to decide whether or not a certain matter was barred as *res judicata* [4] or was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it affords no ground for revision [5] The erroneous rejection of a document as inadmissible in evidence is a mere error in law which is not an illegality or material irregularity [6] The fact that a Court has misunderstood the effect of a document in evidence does not constitute a ground upon which the High Court can interfere in revision [7]

Material irregularity —This means an irregularity in procedure which has produced error or defect in the decision of the case upon the merits [8] This sub section is intended to authorize the High Court to interfere and correct gross and palpable errors of subordinate Courts so as to prevent gross injustice [9] Such as trying one issue only and that a wrong one is a material irregularity [10] When a Court improperly refused to amend a decree which was

unless a failure of justice has occurred [15] A wrong decision on a question of limitation is not open to revision [16] nor is an order to pay rent by instalments under the Bengal Tenancy Act which is an error in law and not in jurisdiction [17]

This section contemplates interference with a perverse decision on a question of law or procedure, a decision being perverse when it is a conscious departure from some rule of law or procedure [18]

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[1] Gurunath v Chenbasappa (1894) 18 Bom, 145

[2] Patel Kilabhai v Hargovan (1895) 19 Bom, 133

[3] Chakrapani v Varatalamma (1895) 18 Mad, 227

[4] Hari v Naro (1885) 9 Bom 432

[5] Sundar Singh v Doru Shankar (1893) 20 All 78

[6] Madhulrav v Gulabbhai (1899) 23 Bom 177 But see, Sato Koer v Gopal Sahu (1907) 34 Calc 929 and Mohant v Lakhai (1907) 11 Calc. W N, 111

[7] Dasrath Rai v Sheodin Rai, (1894) 16 All, 39

[8] x v Shib Chunder, Mad, 220

[9] W N, 617, Raghu, 533

[10] Budhappa v Narsing Rao, (1905) 29 Bom, 213

[11] Balmokund v Sheo Jatan, (1884) 6 All, 125.

[12] Jagannath v Sassoon, (1894) 18 Bom 606

[13] Tirupati v Muttu, (1888) 11 Mad, 322

[14] Asharfi Lal v Deputy Commissioner of Bara Banki, (1895) 22 Calc, 729, L. R, 22 I A, 90

[15] Lakhmichunder v Shosheo Mohun (1874) 22 W R., 277.

[16] Anunda Lall v Debendra Lall, (1897 8) 2 Calc. W. N, [illegible]

[17] Shibh Narain v Baikuntha (1907) 11 Calc W N, 877

[18] Kristamma v Chapa (1894) 17 Mad. 410.

Facts It has been held that it is not open to the High Court *under this* pro is to go into a question of fact[1] even in cases where there is no appeal and where the error is apparent in the decision on the facts[2] But in a later case it is said that under this section the High Court can examine the evidence and itself investigate the facts[3]

Such order as the High Court thinks fit—Form of order —And the c tle or ler of the Full Bench of a Small Cause Court was set aside under this Code for material irregularity the Court thought the proper order was to remit the case to the Full Bench to dispose of the case according to law[4] In the North West it has been decided that the High Court may under this section, pass an order which it might pass on second appeal,[5] and where the decisions of both the Courts were without jurisdiction the Court set aside both decisions and returned the plaint[6] So where the Court after considering the evidence came to the conclusion that it was sufficient to justify the Judge in allowing the case to go to a Jury it set aside the decree and dismissed the suit[7]

The Court has jurisdiction to set aside an order sanctioning prosecution under section 193 I P C[8]

No order —See *Sulbaya v Yellama*[9] The High Court need not interfere even though orders have been made irregularly, if no case for its interference is made out[10]

Consular Court at Zanzibar —The Bombay High Court has no power of revision Zanzibar, though it is authorized t as a Consular Court as a District C 4 A power *of revision* is not an incident of appellate powers but on the contrary can only be exercised where there is no appeal[11]

Letters Patent appeal An appeal lay under s 15 of the Letters Patent against the order of a single Judge of the High Court under s 622, Act XIV of 1882, when such order amounted to a judgment[1] No appeal lies under s 15 of the Letters Patent from an order of a single Judge of the High Court dismissing an application for the exercise of the Court's extraordinary or revisional jurisdiction[13] A party who has preferred an appeal to the High Court when the law gave him no right of appeal is not entitled upon the hearing to ask the Court to treat it as an application for the exercise of its extraordinary jurisdiction under s 15 of the Charter Act[14]

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1 Lamrao v Babaji (1896) 20 Bom 630

2 Pearee Lal in the matter of (1867) 7 W R 130

3 Kailash Chandra v I ss nath (1896 7) 1 Cal W N 67

4 Ralli v Laramanand (1889) 13 Bom 642 and see Seshadri v Krishnan, (1885) 8 Mad 192

5 Muhammad v Syed Husain (1880) 3 All 203 see however, Shiva v Joma, (1883) 7 Bom 341 Dacosta in re B L R, (F B) 432, Har Prasad v Jafar Ali (1885) 7 All 345

6 Satnam v Sakina (1880) 3 All 417 Bhimrav Jivaji v Bhimrav Govind, (1874) 11 Bom H C 194

7 Shields v Wilkinson (1887) 9 All 398

8 Ranjit Singh v Shibbo Mal (1905) A W N 85

9 Sublaya v Yellama (1886) 9 Mad 190 Lingammal v Chinna (1883) 6 Mad, 227, Durga Narain v Ram Lall (1881) 7 Calc 337 Ram Sahai v Mani ram, (1882) 5 Calc 807 Satish Chunder v Nil Comul, (1885) 11 Calc., 45

10 Basharat Ali Chowdhry in re (1897) 24 Calc, 133, and Abdul Sadik v Abdul Aziz, (1897) 21 All 1 2

11 Khoja Shivji v Hasham Gulam (1896) 20 Bom, 480

12 Chappan v Moidin Kutti (1899) 22 Mad 68

13 Hiralal v Am (1898) 22 Bom 511 followed in Nisar Ali v Ali Ali (1906) 28 All, 133 See Nilmani v Mallura (1907) 5 Cal L J, 417

14 Surja Kant in the matter of, (1896) 1 Calc, 383

Execution —Application for execution of orders passed in revision must be made to the Court whose order was reversed [1]

The undernoted decisions under Act XIV of 1872, sect 622 may serve as guide to the interpretation of this section [2]

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[1] Gold v Goldenbergh, (1892) 16 Bom 50

[2] WITHIN SECTION —A decree by a Small Cause Court without evidence—Shields v Wilkinson (1887) 9 All 398 followed in Bisseswar v Johan Smidt (1905) 10 Calc W N 14 or based on an issue that does not arise in it—Venkubai v Lakshman
parties after
486 see Gor
Court confir
diction Ram
Lal (1885)
refusing to issue summonses for witnesses under s 159 former code—Kaji Ahmad v Kaji Mahomad (1885) 9 Bom 308 returning a plaint to be presented in a proper Court—Balam Kuar v Dinu Rai (1886) 8 All 111, Vishanath v Ramkhat (1891) 15 Bom 148 Zamiran v Fateh Ali (1905) 32 Calc 146 an order in
ment by striking out the
Sidu v Ram (1892) 16 B
Act X of 1870 on the g
Collector of Poona (1884) 8 Bom 593 Swamirao v Collector of Dharwar, (1893) 17 Bom 299 a refusal to review judgment not made on the merits—Willis v Jawad (1907) 29 All 468 A W N, 132 a refusal to file an award—Abdeali v Twafali (1906) 8 Bom L R 570 an order under s 174 of the Bengal Tenancy Act when the Judge accepted in deposit a Government Promissory note instead of cash—Rahim Bux v Nundo Lal, (1887) 14 Calc 321 Lal Mohun v Jogendra (1887) 14 Calc 636 an order of a special Judge dismissing an appeal preferred under s 108 cl (2) of the Bengal Tenancy Act on the ground of insufficient payment of Court fees—
Upadhya T
Act XIX of
should be
Mad 68
Collector of
or making
krishna (1
97) and
Srigopal (1895)
under Sch II
414 or refusing
Mad 68 an
Act XX of 1864

decree holder—Vithal v Fast (1891) 15 Bom 734, an order rejecting an appeal at any by the judgment debtor to set aside a sale under O X r. 89 (s. 310A, former Code) on the ground that he had no ...

the High Court under this es where there is no appeal a the facts[2] But in a later case it was said that under this section the High Court can examine the evidence and itself investigate the facts[3]

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Consular Court at Zanzibar —The Bombay High Court has no power of revision over civil cases tried by the Consular Court at Zanzibar, though it is authorized to hear appeals from the decision of that Court as a Consular Court as a District Court by the Zanzibar Order in Council of 1884 A power of revision is not an incident of appellate powers, but on the contrary, can only be exercised where there is no appeal[11]

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[1] Lamra v Babaj (1896) 20 Bom 630

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[4] Lalli v Parmanand (1889) 13 Bom 642 and see Seshachara v Krishnan, (1887) 8 Mad 192

[5] Muhammad v Syed Husain (1880) 3 All 203 see however, Shiva v Joma, (1883) 7 Bom 341 Dacosta in re B L R, (F B) 432, Har Prasad v Jafar Ali (1885) 7 All 345

[6] Sarnam v Sakina, (1880) 3 All 417 Bhimrav Jivaji v Bhimrav Govind, (1874) 11 Bom H C 191

[7] Shields v Wilkinson, (1887) 9 All, 398

[8] Ranjit Singh v Shibbo Mal (1905) A W N, 85

[9] Subbaya v Yellama (1886) 9 Mad, 130 Lingammal v Chinna, (1883) 6 Mad, 227 Durga Narain v Ram Lall, (1881) 7 Calc, 330 Ram Sahai v Mani ram (1880) 5 Calc 807 Sotish Chunder v Nil Comul, (1885) 11 Calc, 45

[10] Basharat Ali Chowdhry in re, (1897) 24 Calc, 133, and Abdul Sadik v Abdul Aziz (1897) 21 All, 12

[11] Khoja Shivji v Hasham Gulam (1896) 20 Bom, 480

[12] Chappan v Moidin Kutti (1899) 22 Mad 68

[13] Hiralal v Ani (1898) 22 Bom 541 followed in Nisar Ali v Ali Ali, (1906) 28 All, 137 See Nilkant v Mathura (1907) 5 Calc L J, 413

[14] Sooraj Kant in the matter of, (1870) 1 Calc 383

Not within the section —An order under s 18 Act XX of 1863 refusing permission to sue—Venkateswara v … (1887) 10 Mad 98 and see the note at that

Tenancy

Ali v K

Chattar

receive

under this section—Gulam Jilani v Muhammad Ahmed, (1901 2) 6 Calc W N, 162, (1902) 29 Calc, 167

A District Judge acting under s. 23 of the Bombay District Municipal Act, Amendment Act (II of 1884) is not a Court within the meaning of s 622, (former Code) and the High Court has no jurisdiction to revise his order refusing

In a Calcutta case it was stated that S 622 of the former Code was of very limited operation, and where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on those questions—Krishna Mohan v Kedar Nath, (1888) 15 Calc., 446.

…sat, (1894) 18 Bom … an order reject… judgment debtor to set aside a sale under O XXI Code) on the ground that he had no interest or

Provisions not applying to High Court in original civil or insolvent jurisdiction

120 (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20

(2) Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court

Act XIV of 1882 sections 638 and 639

This proviso deals only with the sections in the body of the Code the rules and orders which are not intended to apply to High Courts are set out in Order XLIX

Ordinary or extraordinary civil jurisdiction —Ordinary jurisdiction embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it, and it is opposed to extraordinary jurisdiction which the Court may assume at its discretion upon special circumstances and on special orders [1] Thus a judgment entered up in the name of the Official Assignee against the insolvent is entered up in the ordinary jurisdiction of the High Court,[2] but the appointment of a member of a committee under s 10 Act XX 1863 is not a matter of ordinary civil jurisdiction of a District Court [3]

Insolvency jurisdiction —As to the non application of the Code, see *Hormatji Ardesir Hormasji, in re* [4]

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[1] Navivahu v Turner, (1889) 13 Bom [illegible], L R 16 I A [illegible]

[2] *Id*

[3] *Minakshi v Subramanya* (1887) L R 14 I A 160 (1888) 11 Mad 26

[4] (1893) 17 Bom, 34[illegible]

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS

116 This Part applies only to High Courts which are or may hereafter be established under the Indian High Courts Act, 1861

Part to apply only to certain High Courts

A copy of this Act (24 & 25 Vict c 104) is printed in the addenda of this work

117 Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts

Application of Code to High Courts

118 Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs,

Execution of decree before ascertainment of costs

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation

119 Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys

Unauthorized persons not to address Court

Act XIV of 1882, sections 631, 632, 634 and 635 See notes to section 2 (15) *ante*, and as to the power of a pleader to delegate his authority to another pleader the under noted cases [1]

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[1] Shidappa *in re*, (1898) 22 Bom, 661 and Shivlayal v Khetra Cargu (1896) 20 Bom, 293. As to an advocate see Bakhtawar Singh v Sant Lal, (1887) 9 All, 617

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[1] Narrabhu v Turner, (1889) 13 Bom 20, L R 16 I A

[2] *Id*

[3] Minakshi v Subramanya (1886-7) L R, 14 I A 16

[4] (1893) 17 Bom, 340

PART X.

RULES

Effect of rules in First Schedule

121 The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part

The reasons for this new [illegible]
set out in the *Report on* [illegible]
here Practitioners have [illegible]
framers of the Code and set out in Sche[illegible]
sanction and authority of the Governor Gen[illegible]

[illegible] and Chief Courts
are to be exercised

Powers of certain High Courts to make rules

122 High Courts established under the Indian High Courts Act, 1861, and the Chief Courts of the Punjab and Lower Burma, may, *from time* to time after previous publication make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence and may by such rules annul, alter or add to all or any of the rules in the First Schedule

Constitution of Rule Committees in certain Provinces.

123 (*1*) A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon

(*2*) Each such Committee, shall *consist of the following* persons, namely —

(*a*) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years,

(*b*) a barrister practising in that Court,

(*c*) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(*d*) A judge of a Civil Court subordinate to the High Court, and

(*e*) in the towns of Calcutta, Madras and Bombay, an attorney

(*3*) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee

(*4*) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf, and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead

(*5*) There shall be a Secretary to each such Committee who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor General in Council or by the Local Government, as the case may be

Committee to report to High Court.

124 Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration

Power of other High Courts to make rules.

125 High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor General in Council may determine

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code

Power of other High Courts to make rules as to matters other than procedure

130 A High Court not established under the Indian High Courts Act, 1861, may, with the previous sanction of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 of that Act, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency town

Publication of rules

131 Rules made in accordance with section 129 or section 130 shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law

Act XIV of 1882 sect 652 Section 109 saves the existing rules of the High Court Some of those Rules for example those relating to admission of facts, are very similar to the new provisions inserted in the first Schedule to this Code, and it is probable that the first step of the Rule Committees will be to revise the existing rules

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PART XI.

MISCELLANEOUS.

Exemption of certain women from personal appearance

132 (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code

Act XIV of 1882, sect 640 This section applies to H C and Prov S C C.

Women—An unmarried girl of twelve years of age is a woman [1] The privilege is limited to the class of persons described in this section—women who according to the customs and manners of the country, ought not to be compelled to appear in public It cannot be claimed by all women of rank,[2] but out of respect to the customs of this country, the invariable practice has been to allow respectable females, who are not accustomed to appear generally before the public to be examined in their *palkis* [3]

Purda ladies [4]—Where an application was made under this section on the following grounds (1) that A had lost her husband ten months previously, and according to Parsi customs she could not leave her house for two years *from her* husband s death, (2) that B was fifty eight years of age, sickly and unable to attend, (3) that C wanted to go up country, the application was refused [5]

Para 2—See Section 56 *ante*

Exemption of other persons

133 (1) The Local Government may, by notification,[6] in the local official Gazette, exempt from personal appearance in Court any person

[1] Mainath Singh v Moorta Kooer, (1875) 24 W R, 375.

[2] Davis v Middleton, (1867) 8 W R., 252

[3] Kisto mohun Mookerjee v Adarmoney Dabee, (1864) 2 Hyde, 88, Rookia Banu v Roberts, (1868) 1 B L R., S N, v See also Zohurutoollah Chowdhry v Asaloodleen, (1871) 15 W R, 129 See "Discretion" O XXVI, r 1

[4] See note to Order XVIII r 4 Chamatkar Mohiney v Mohesh Chunder, (1899) 3 Calc W. N, 750, 26 Calc 651, note, Mohesh Chunder v Manick Lal, (1899) 3 Calc W N, 751, 16 Calc., 650, and Provat Kumaree v. Opurba Kissen, (1899) 3 Calc. W. N, 753

[5] Rustomji v Banoobai, (1890) 14 Bom, 594

[6] Vol I, p. 197, Oudh List of Local Rules and Orders, ed 1894, p. 114—Note, Provinces and Department.

it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

Power of other High Courts to make rules as to matters other than procedure

130 A High Court not established under the Indian High Courts Act, 1861, may, with the previous sanction of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 of that Act, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town

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PART XI.

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Purda
following gro
according to _
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[4] See note to Order XVIII r 4 Chamatkar Mohiney v. Mohesh Chunder, (1899) 3 Calc. W. N, 750, 26 Calc, 651, note, Mohesh Chunder v Manick Lal, (1899) 3 Calc. W N, 751; 16 Calc, 650, and Provat Kumaree v. Opurba Kissen, (1899) 3 Calc W. N, 753.

[5] Rustonji v Banoobai, (1890) 14 Bom, 584

[6]

r—

', ed. 1898, Vol I, p.
Western Provinces
Department, ... ed 1894, p 114—Note,

whose rank, in the opinion of such Government entitles him to the privilege of exemption

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs

Act XIV of 1882 Sect 641 This section applies to H C and Prov S C C

The exemption is absolute and not limited to cases in which the party claiming it has been summoned by the opposite party A Rajah instituted a suit under Act X of 1859 through an agent appointed in that behalf The [illegible] not being satisfied with the information which the agent could [illegible] and required the personal [illegible] exempted but the [illegible]

134 The provisions of sections 55, [illegible] apply, so far as may be, to all persons arrested under this Code

[illegible]

This section extends the provisions of this Code relating to arrest detention and release to all persons arrested under the Code

135 (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court

[illegible]

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents and recognized agents and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal

[illegible]

(3) Nothing in sub section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment debtor attends to show cause why he should not be committed to prison in execution of a decree

Act XIV of 1882, sect 642 This section applies to H C and Prov S C C

not for the personal benefit of the
and the better adminis
that his attendance was
summoned by, and exami
ned as a witness for the p m from arrest on civil process during the time reasonably occupied in going to, attending at and returning from the place of trial [2]

"Other than for Contempt" —These words have been inserted in this section to give effect to j d c al decisions on the point [3]

Even in a st
where the defenc
appearing in Court for
of Bengal, went to Madras, on the 24th of O
adj rned for seven weeks on the 27 h October, and he was arrested on the
10t privileged [5]

Where
, and the
rece int of the
Small Cause Court, it w behind the
return and show that he was exempted from arrest at the time he was taken into custody [6]

Pleader —A pleader while acting as such in a Court is exempted from arrest [7]
S law is legal in this country [8]

not
bee

136 (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order

Procedure where person to be arrested or property to be attached is outside district

1 Wooma Churn Dole v Teil (187) 14 B L R, App, 13
2 Appasamy Pattar v Govinda Nambiar, (1868) 4 Mad H C 145
3 Johar v Carter (1870) 4 B L R, O J 90 Samarapari v Parry Co (1890) 13 Mad, 150
4 Soorendra nath Roy, in the matter of, (1880) Calc
5 Shiva Bux, in the matter of, (1882) 4 Mad, 317
6 Omrit lal Dey in the matter f (1876) 1 Calc 74, of, (1879) 5 C L R 170
7 Rajendra Narain v Chunder Mohun (1896) 23 Cal 125
8 Abraham v Queen, (1868) 1 B L R A Cr 17, v Kasheeoodowlah, (1874) 7 Mad H C, 235 "Valver,"

Oath on affidavit by whom to be administered

139 In the case of any affidavit under this Code—

(*a*) any Court or Magistrate, or

(*b*) any officer or other person whom a High Court may appoint in this behalf, or

(*c*) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to the deponent

Act XIV of 1882, sect 197

Rules of the Supreme Court 1883 Order 38, r 4 This section applies to H C and Prov S C C

The juror should describe the person before whom the affidavit has been sworn so that it may appear to have been taken by a competent authority

Officers appointed by High Court—For notifications conferring such powers in

(*a*) Assam, see Assam List of Local Rules and Orders ed 1893 p 191

(*b*) Bombay, see Bombay List of Local Rules and Orders, ed 1896, Vol I, p 39

(*c*) Burma see Burma Rules Manual, Ed 1897 p 110

Or other persons—The insertion of these words empower the High Court to appoint persons other than their own officers to administer affidavits

Courts empowere
Bengal and Bombay ha
... powers to administer

Bombay Government Gazette Part I, 1877

Assessors in causes of salvage, &c

140 (1) In any Admiralty or Vice Admiralty cause of salvage, towage or collision, the Court whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance in such manner as it may direct or as may be prescribed, two competent assessors and such assessors shall attend and assist accordingly

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed

Act XIV of 1882 sect 643A

As may be prescribed—That is by Rules made under Part X

Miscellaneous proceedings

141 The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction

Act XIV of 1882, sect 647 This section appl es to H C and Pr S. C C

This section contemplates that certain formal t s of p ore e shou d be observed even in miscellaneous appl cations wh ch are not s s. So it has been held that an application under s 18 of Act XX of 1863 (Re g o s Endowme Act should therefore be duly verified and prese ted e her by the app ant in person or by his pleader [1] and in proceed ngs for the appo ntment of a guardian the Code should be followed [2]

The provisions of sect former code (s 24) read w h this sect on are appl cable to proceedings for the w n ling up of companies.[3] Proceed n s held to decide ly for the co on is a Ft o e makes the Code appl cable to applicat ons for the appo ntment of guardians, and for custody of infants to proceed ngs under the Divorce Act, and to matters of procedure in the Revenue Courts of the N W P and to proceed ngs under s 18 of Act [7] f the Land Acqu s t on does r r probate.[8] This section Cr Pro Code

142 All orders and notices served on or given to any person under the provisions of this Code shall be in writing

Orders and notices to be in writing

Act XIV of 1882 sect 94 This section appl es to H C and Prov S C C

As to serv ce on a person outs de Br tish Ind a, see Ghamsham Lal Bhansali [10]

143 Postage, where chargeable on a notice, summons or letter issued under this Code and for warded by post, and the fee for register ing the same shall be paid within a time to be fixed before the communication is made

Postage

Provided that the Local Government, with the pre vious sanction of the Governor General in Council, may remit such postage or fee or both, or may prescribe a scale of court fees to be levied in lieu thereof

Act XIV of 1882, sect 95

Th s sect on applies to H C and Prov S C C

How and by whom paid — H s Excellency the Governor General in Council is pleased to direct that n future the postage charges on all proces es notices and such other documents as are issued from any judic al or revenue Court, and are requ red to be transm tted by post shall be pa d by means of

1 Amd o M u Mul ar ud Daral Kl a (1901) 24 Mad. 685 p 689
2 Ga ga Bu Mu ani (190) A W N 104 (1906) A W N 64
3 West Hop cto n Ica C r re (1857) 9 All 180
4 Bombay Burmah Trad g C rat e D r d ji Cursetji S r ff (1903) 2 Bom. 415 p 418
5 A ir H Ali (1887) 9 All 11
6 Inj a Na l S ra N th R y (1887) 24 C 1 , 2 6 1 Cal W N
7
8 91
9 Jawalal in re (1891) 18 Bom.
10 13

service postage stamps, without any additional charge being levied from the parties at whose instance the processes are issued —C O No 9 of 10th May 188[illegible] p 1 9 Vol I Civil Rules and Orders of the Calcutta High Court

Application for restitution

144 (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or reversal

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub section (1

Act XIV of 1882 sect 583 This section applies to H C

It has been recast to conform with the practice instituted under sect 583 of Act XIV of 1882 a practice sanctioned by many decisions of the Courts which it is no longer necessary to record The widest discretion is given hereby and the Court makes any necessary order which it has jurisdiction to make and enforce The following decisions under the former provision in the same behalf may still prove serviceable

Duty of the Court — A Court has an inherent right irrespective of this section to order restitution[1] The principle of the doctrine of restitution is that on reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost It is the duty of the Court to enforce that obligation unless it be shown that restitution would be clearly contrary to the real justice of the case With reference to the position of innocent third parties, the rule that a plaintiff in an action to recover land cannot by his writ of restitution or of assistance dispossess a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant, does not apply when the party seeking to be restored to possession has been wrongfully dispossessed by the agency of the Court[2] Party includes the party's representative within the meaning of sect 47[3] In a suit for possession of land restitution carries mesne profits and interest on them[4]

Person making restitution, or assignee —The person making restitution is bound to restore everything to which he is not entitled and cannot set up another person's title,[5] and he is bound to give up anything in his possession If property is sold under a decree and bought in by the creditor, and the decree

[1] M[illegible] Lal v Mah[illegible] Sami, (1887) 14 Calc, 484 Raja Singh v Kould[illegible] S[illegible] (1894) 21 Calc, 169 [illegible] Singh v Ma[illegible] Ram (1902) 6 Calc W N 710 [illegible] (190[illegible]) 9 Calc W N 281

[2] D[illegible] Ayyar v Annasami Ayyar (1901) 23 Mad 308

[3] Jamini v D[illegible] (1905) 33 Calc 507 4 Calc L J 102

[4] M[illegible] Lal v Mah[illegible] Sami (1887) 14 Calc 484 Kahar[illegible] v [illegible]swara (1887) 11 Mad 201 Raja Singh v Kould[illegible] Singh (1897) 21 Calc 383 D[illegible] Shankar Ch[illegible] (1904) 9 Calc W N 381

[5] [illegible] Cor[illegible] v Math[illegible] (1872) 17 W R, 222

is afterwards set aside, he is bound to restore it,[1] though he may sue for his purchase money.[2] But where property to the restitution of which a party is entitled is transferred after decree, the party entitled cannot put the transferee on the record and summarily enforce his rights.[3] A plaintiff in a pre emptive suit obtained a decree and paid into Court the pre emptive price. The money was drawn out of Court by the vendor. Subsequently the decree was reversed and the plaintiff applied for a refund of the money paid into Court. *Held*, that he was entitled to it with interest up to date of repayment.[4] If the thing to be restored is land, the person entitled to restitution is entitled also to mesne profits.[5] Appellants to the Privy Council who had antecedently to filing their appeal paid to the assignee of the decree appealed against, which was for costs only, the amount then payable under that decree, cannot on succeeding in their appeal obtain restitution merely by virtue of, and in execution of, the order of Her Majesty in Council, the assignee of the decree having been no party to the appeal.[6]

Jurisdiction.—A Subordinate Judge is not limited to 5,000 rupees, when his decision has been set aside on appeal to the District Judge.[7]

Probate.—After appeal to the High Court, probate must be applied for to and issued by, the District Court.[8]

Limitation.—Applications made to obtain restitution under a decree are proceedings in execution of that decree, and are governed by the Limitation Act, Sched II, art 179.[9]

An application by the judgment debtor for refund of money taken out of Court by a decree holder in excess of the amount of his decree is a question relating to the execution of the decree and the rule of limitation applicable is possibly three years.[10]

Enforcement of liability of surety

145 Where any person has become liable as surety—

(*a*) for the performance of any decree or any part thereof, or

(*b*) for the restitution of any property taken in execution of a decree, or

(*c*) for the payment of any money, or for the fulfilment of any condition imposed on any

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[1] Sadasivayyar v Muttu, (1882) 5 Mad, 106

[2] Hira Lall v Gourmoni, (1886) 13 Calc, 326

[3] Raynor v Mussoorie Bank, (1885) 7 All, 681

[4] (1896) 18 All, 262 As to interest ed, see also, Phul Chand v Shankar

[5]

[6] Sa

a refund

[7] Balavantrav v Sadrudin, (1889) 13 Bom, 485

[8] Bayabai v Sarasvatibai (1893) 17 Bom 686

[9] Venkayya v Ragavachariu (1897) 20 Mad 448 Nandram v Sitaram, (1886) ... 10 Mad,

[10] Nand Ram Bom, 19,

Apart from this section a Civil Court probably has inherent power to vary its own orders in order to carry out its own meaning, and to make clear and plain any doubtfully worded expressions [2]

This section is taken from the English rule under which it has been decided that where a judgment as entered is manifestly contrary to the intentions of the judge it can be corrected [3] but where the order represents the actual decision of the Court it cannot be corrected because that decision based upon a misrepresentation or mistake amounting to something more than an accidental slip [3]

At any time —Lapse of time cannot affect the powers of the Court under this section. In *Hatton v. Harris* [4] an error was amended thirty nine years after its occurrence but an application has been refused to vary the form of a charging order after judgment had been pronounced for administration of the debtor's estate [5]

Practice For the English practice, see, Ann Prac (1908) Vol I p 365 Under this section no application is necessary and the Court may make an order of its own motion

153 The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding

General power to amend

Rules of the Supreme Court Order 28 r 12

Under the corresponding rule of the Supreme Court amendments have been made in England in pleadings and applications of all kinds, interrogatories and answers thereto, petitions in matrimonial suits, summons etc etc See Annual Practice (1908) Vol I, 466, 467 Such amendments have also been allowed in every kind of legal document in the Indian Courts and the practice will no doubt be continued under the same principles as heretofore the facts of each case being carefully considered in order to ascertain whether the amendment asked for can be granted without prejudice to parties other than the applicant and whether it should be granted upon terms as to costs or otherwise

154 Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement

Saving of present right of appeal

155 The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof

Amendment of certain Acts

156 The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof

Repeals

[2] See Lawrie v. Lees 7 App Cas pp 35 [illegible] per Lord Penzance Milson and Carter (1893) A. C 640 and see Order XX r 3 post

[3] Moore v. [illegible] 4 Times Rep 7[illegible]

[3] Preston Banking Co v. Allsup, (1895) 1 Ch 141

[4] Hatton v. Harris (1892) A. C p. 560 see Lord Macnaghten's judgment, but not if third parties have acquired rights under the order which rights would be affected by the amendment, see Lord Herschell in the same case

[5] Swanstone v. [illegible] (1899) 1 Ch 3[illegible]

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[2] Moore v. Hill, 4 Times Rep [illegible]

[3] [illegible] Co v. Ansop (1896) 1 Ch 141

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[2] Mo... 4 Times Rep 734

[3] ... Ch 141

[4] ... Harris ... A C ... See Lord Macnaghten ... but ... under the order ... would ... in the same ...

[5] ... (1889) 1 Ch ...